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IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1958

WILLIAM HARPOLE, Superintendent of the Mississippi State Penitentiary, Parchman, Mississippi .... Petitioner

versus

UNITED STATES OF AMERICA, ex rel., ROBERT LEE GOLDSBY .... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, William Harpole, Superintendent of the Mississippi State Penitentiary, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review the judgment of that Court, entered on January 16, 1959, which (a) reversed an order of the United States District Court for the Northern District of Mississippi, Greenville Division, (R. 46, 47) entered on April 3, 1958, denying respondent's petition for a writ of habeas corpus, and (b) prescribed a period of eight months within which the State of Mississippi would be permitted to re-try the respondent, Robert Lee Goldsby, but provided that in the event of failure to so re-try respondent said Court would consider and decide whether or not respondent should be discharged upon said petition for habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 263 F. 2d 71 (Advance Sheet). The opinion of the United States District Court which was appealed to and reversed by the Court of Appeals has not been reported but appears as Appendix C hereto.

JURISDICTION

The date of the judgment of said Court of Appeals (Appendix B) sought to be reviewed herein, which reversed the District Court, is January 16, 1959.

By order dated February 4, 1959, (R. 300) petitioner was granted an extension of twenty-one days from February 6, 1959, within which to file a petition for rehearing in said Court of Appeals. The petition for rehearing, timely filed, was denied by order dated March 17, 1959 (R. 364).

The petitioner has no appellate remedy other than certiorari to this Court.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, which provides in part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTIONS PRESENTED

The Federal questions of substance which have been raised by the decision of the Court of Appeals are:

(1) Can a prima facie case of systematic exclusion of Negroes from grand and petit jury panels in violation of the Fourteenth Amendment to the Federal Constitution be proved by merely showing that Negroes have not served on jury panels, without also showing that there are Negroes within the area from which the juries are selected who are legally qualified to serve as jurors or that Negroes have been hindered or prevented from becoming legally qualified to serve as jurors?

(2) Is the bare allegation made in a petition for writ of habeas corpus charging the systematic exclusion of Negroes from grand and petit juries in a county, which allegation is denied by the answer of respondent therein, and where not only is there no proof whatsoever adduced at the hearing on said petition by or on behalf of the petitioner therein to support the aforesaid allegation of systematic exclusion, or even proof of a single act of unlawful exclusion, but also where the petitioner therein fails to show that there is a single Negro in the county who is a qualified juror, or even a qualified elector, which is a prerequisite to being a qualified juror, sufficient to make out a prima facie case of systematic exclusion of Negroes from grand and petit juries in violation of the Constitution of the United States, requiring refutation by the State?

(3) Where the general competency of counsel for a defendant charged with a capital crime, as well as their vigorous defense of the defendant, was attested by affirmative, undisputed proof, does the failure of such counsel to object, either prior to or at the trial, to the petit jury

summoned to try the defendant upon the ground that Negroes had been systematically excluded therefrom, and which question is not raised on appeal to the State Supreme Court from the judgment of conviction but was raised for the first time in the defendant's petition for writ of certiorari to the United States Supreme Court after said cause was affirmed by the State Supreme Court, constitute an effective waiver of the right to make such objection?

(4) Does the mere fact that Negroes comprise a majority of the population of a County, coupled with the fact that there is no proof whatsoever that there are any Negro qualified electors in the County at the time of an accused's trial, and coupled with the further fact that the accused wholly fails to show a single instance where a registration official has arbitrarily refused to register a Negro or any instance where any Negro has been threatened, intimidated or otherwise discouraged by anyone to prevent him from presenting himself for registration to vote, negative the assumption that Negroes, en masse, or in any substantial numbers, have voluntarily abstained from registering as electors, thereby rendering themselves ineligible for jury duty?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States, the pertinent part of which is as follows:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Said Fourteenth Amendment is set out verbatim in Appendix D hereto.

Title 28, United States Code, Section 2241, the pertinent part of which is as follows:

> "(c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> . . . .
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

Said Section 2241 is set out verbatim in Appendix E hereto.

Sections 26, 241, 242, 243, 244, prior to amendment in 1955, and 264 of the Mississippi Constitution of 1890, (Vol. 1, Mississippi Code of 1942, Recompiled, pp. 187, 349, 352, 353, 354, and 365, respectively) and Section 1762 of the Mississippi Code of 1942, Recompiled, all of which are set out verbatim in Appendix F hereto.

STATEMENT OF THE CASE

The United States District Court took jurisdiction of respondent's petition for writ of habeas corpus under Title 28, United States Code, Section 2241.

On September 4, 1954, Mrs. Moselle McCorkle Nelms was shot to death in the Second Judicial District of Carroll County, Mississippi. Later the same day, the respondent was arrested, charged with her murder and placed in jail.

On November 8, 1954, at the regular term of the Circuit Court of the Second Judicial District of Carroll County, Mississippi, the respondent was indicted for the murder of Mrs. Nelms. He was arraigned on the same day said indictment was returned, and Attorney Leighton, the same counsel who now represents the respondent, appeared with the respondent at the arraignment. *Goldsby v. State*, 1955, 226 Miss. 1, 7, 78 So. 2d 762, 763. At that time, Attorney Leighton requested time to prepare and file some motions, and the trial judge announced that he would give him two days within which to do so (R. 200-202). By agreement, the case was set for call for November 10. Prior to the time set for the trial, however, Attorney Leighton withdrew as counsel for the respondent, leaving the respondent without counsel. Thereupon, the Court appointed Attorney Ringold to represent the respondent, and the case was passed until the next day. Subsequently, Attorney Ringold requested permission for Attorney Prewitt, who had been employed by relatives of the respondent, to appear as counsel for the respondent also. This request was granted and both attorneys, Ringold and Prewitt, defended respondent at the trial.

A motion for a change of venue was filed by Attorneys Ringold and Prewitt, but, in the face of the testimony of thirteen witnesses introduced on behalf of the State, the motion was denied.

On the motion of Attorneys Ringold and Prewitt, a special venire of 100 men, from which to secure the trial jury, was drawn.

At the conclusion of the trial, the jury having found him guilty as charged, the Court imposed the mandatory sentence upon respondent of death by electrocution.

A motion for a new trial having been denied by the trial court, Attorneys Ringold and Prewitt took an appeal to the Supreme Court of Mississippi, where respondent's conviction was affirmed on March 28, 1955, and Friday, May 13, 1955, was fixed as the new date for the execution of the death penalty. *Goldsby v. State*, 226 Miss. 1, 7, 8, 19, 78 So. 2d 762, 763, 764, 769.

Thereafter, Attorney Leighton re-entered the case, and, on behalf of the respondent, filed in the United States Supreme Court a petition for writ of certiorari, which was denied. *Goldsby v. Mississippi*, No. 279, Misc. December 12, 1955, 350 U. S. 925.

On January 16, 1956, the Supreme Court of Mississippi fixed a new date for respondent's execution for February 24, 1956. *Goldsby v. State*, 226 Miss. 19, 84 So. 2d 528. Three days before the date set for his execution, on February 21, 1956, Attorney Leighton filed for respondent a petition for writ of error coram nobis or, in the alternative, writ of habeas corpus, in the Supreme Court of Mississippi. Among the questions raised in said petition was that of the denial of respondent's constitutional rights by virtue of the alleged systematic exclusion of Negroes from jury panels in the Second Judicial District of Carroll County. Said petition was denied on March 5, 1956, and the Mississippi Supreme Court set Friday, March 23, 1956, as the date for respondent's execution. *Goldsby v. State*, 226 Miss. 20, 29, 86 So. 2d 27, 33.

Respondent, through Attorney Leighton, then filed in the Supreme Court of the United States another petition for writ of certiorari, securing a stay of execution pending consideration of said petition. Among the grounds for reversal argued by respondent in his said petition for writ of certiorari in that instance was the allegation that Negroes had been systematically excluded from the grand and petit jury panels in Carroll County, Mississippi, and that respondent had been denied his constitutional rights.

Before passing upon respondent's said petition, this Court, by letter from its Clerk, dated October 19, 1956, called upon the Attorney General of Mississippi for a response to respondent's said petition, said letter reciting in part that:

> "The response should discuss particularly the issues of systematic exclusion of negroes from the grand and

petit jury panels and the state procedure for raising this question in a post conviction proceeding."

Thereafter, on December 10, 1956, this Court denied petitioner's petition for writ of certiorari. *Goldsby v. Mississippi*, No. 183 Misc. 1956, 352 U. S. 944.

The Supreme Court of Mississippi again set a date for the execution of Goldsby, this date being February 12, 1957. *Goldsby v. State*, 226 Miss. 30, 31, 91 So. 2d 750.

On January 29, 1957, Attorney Leighton filed for respondent a petition for writ of habeas corpus in the United States District Court for the Northern District of Mississippi, Greenville Division. After hearing arguments of counsel, but without requiring a response to said petition, District Judge Cox denied the petition and also refused to issue a certificate of probable cause. On February 8, 1957, a motion for stay of execution was denied by Judge Wayne G. Borah of the United States Court of Appeals for the Fifth Circuit. However, on February 11, 1957, Chief Justice Warren granted a stay of execution "until petitioner has had an opportunity to exhaust his federal rights in this proceeding."

Thereafter, the Court of Appeals for the Fifth Circuit heard the appeal from the decision of Judge Cox, and, on November 20, 1957, reversed and remanded the cause for a hearing. *United States ex rel. Goldsby v. Harpole*, 249 F. 2d 417. On remand, the case was heard at a special session of the District Court by Judge Claude F. Clayton on April 3, 1958. At the conclusion of the evidence and after hearing arguments, Judge Clayton denied the petition and refused to issue a certificate of probable cause (R. 223-225, App. C).

On April 21, 1958, the Mississippi Supreme Court set May 29, 1958, as the new date for the execution of the respondent. *Goldsby v. State*, Miss., 102 So. 2d 215. On May 7, 1958, Chief Justice Warren again granted a stay of execution "until the petitioner has had an opportunity to exhaust his federal rights in this habeas corpus proceeding."

On appeal by the respondent herein to the Court of Appeals for the Fifth Circuit, that Court, by opinion dated January 16, 1959, granted respondent a certificate of probable cause and reversed the judgment of the United States District Court, holding that Negroes were systematically excluded both from the grand jury which indicted Goldsby and from the petit jury which convicted him; that the objection as to the petit jury was not effectively waived; that the objection as to the grand jury was waived; that Goldsby is legally detained under his indictment for murder but he is entitled to be tried within a reasonable time, and further expressing its opinion that a period of eight months from and after the entry of said judgment or its final test by certiorari or otherwise would be sufficient to afford the State of Mississippi an opportunity to take the necessary steps to re-try the respondent before a jury from which Negroes have not been systematically excluded or before some court or tribunal so constituted as not to violate his constitutional rights, providing further that if Goldsby has not been re-tried within said period, said Court of Appeals will consider and decide whether or not he should be discharged upon said petition for habeas corpus (App. A). It is a review of this judgment of said Court of Appeals which is sought by this petition.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH FEDERAL AND STATE DECISIONS.

In rendering its decision in the instant matter (App. A), the Court of Appeals has: (a) decided federal questions in ways in conflict with the applicable decisions of this Court; (b) rendered a decision in conflict with the consistent opinions of other Courts of Appeals upon the issues herein; and (c) has decided an important state question in a way in conflict with applicable state law. Rule 19(1)(b), Revised Rules of this Court. A detailed analysis of the controlling principles contained in the said opinion of the Court of Appeals which are in direct conflict with consistent and unvarying decisions of this Court and of other courts is contained in the succeeding portions of this petition.

II

RESPONDENT HEREIN WHOLLY FAILED TO PROVE A PRIMA FACIE CASE THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM GRAND AND PETIT JURIES IN VIOLATION OF THE FEDERAL CONSTITUTION, REQUIRING REFUTATION BY THE PETITIONER HEREIN.

A. *The burden of proof was upon the respondent, and he failed to meet it; therefore, the burden did not shift to the petitioner.*

In vew of the language of the United States Court of Appeals for the Fifth Circuit in its earlier opinion remanding to the United States District Court for a hearing on the petition for writ of habeas corpus of Robert Lee

Goldsby (herein referred to as respondent), *United States ex rel. Goldsby v. Harpole*, 1957, 249 F. 2d 417, 421:

> "It is, of course, incumbent upon the applicant to carry the burden in a collateral attack upon a judgment, Williams v. Kaiser, [323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398]; Walker v. Johnson, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 . . ."

which statement follows the holding of this Court in *Johnson v. Zerbst*, 1938, 304 U. S. 458, 468:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity,".

and after a thorough study of the cases cited in the opinion of the Court of Appeals (App. A) and the authorities found by us in our independent research, we were convinced at the hearing upon respondent's petition for writ of habeas corpus in the United States District Court, and we are still convinced, that the proof adduced by respondent in support of his petition for writ of habeas corpus in the instant matter was grossly inadequate and fell far short of making out a prima facie case that Negroes were systematically excluded either from the grand jury which indicted the respondent herein or from the petit jury which convicted him, requiring refutation by William Harpole, Superintendent of the Mississippi State Penitentiary (herein referred to as petitioner). Hence, petitioner herein determined upon said hearing that he should not burden the District Court with proof unnecessary to the determination of the issues.

Nevertheless, the Court of Appeals held (App. A, p. 72) that the respondent herein proved a strong prima facie case that Negroes were systematically excluded from said grand and petit juries, which case was not refuted by the petitioner herein, and also held (App. A, p. 77) that the systematic exclusion of Negroes from a trial jury is violative both of the equal protection clause and of the due process clause of the Fourteenth Amendment. While the Court of Appeals held (App. A, p. 83) that Negroes were systematically excluded from the grand jury which indicted the respondent, it further held that respondent had waived any objection thereto.

B. *No Negroes were qualified to serve as jurors; therefore, there was and could have been no systematic exclusion of Negroes.*

In order for there to have been a violation of respondent's constitutional rights by virtue of the systematic exclusion of Negroes from the grand jury which indicted him and the petit jury which tried him, it was necessary that there be some Negroes legally qualified to serve as jurors in the Second Judicial District of Carroll County at the time of his indictment and conviction. But there were none. The record fails to reveal any proof whatever that there was a single Negro qualified for jury service at the necessary times.

In its opinion (App. A, p. 69), the Court of Appeals quoted from *Hernandez v. Texas*, 1954, 347 U. S. 475, 480, as follows:

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris v. Alabama*, 294 U. S. 587. In that case, proof that Negroes constituted a substan-

tial segment of the population of the jurisdiction, *that some Negroes were qualified to serve as jurors,* and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called 'the rule of exclusion,' has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class." (Emphasis supplied)

It appears that the Court of Appeals, in applying the aforesaid "rule of exclusion" to the facts of the instant case, failed to take cognizance of an essential element of said rule, to-wit: *That there must be some members of the class alleged to be excluded who are qualified to serve as jurors.* The said "rule of exclusion" was recognized by the United States Supreme Court long before the *Hernandez* case was decided, and it has continued to be the rule applied in cases of this kind. In fact, *all of the cases cited by the Court of Appeals* in that portion of its opinion dealing with the question of whether respondent had proved a prima facie case of systematic exclusion of Negroes were cases where there were members of the alleged excluded class who were qualified jurors in the county. We do not by this statement, however, intend to appear critical of said Court's choice of cases in support of its conclusions. For respondent cited no cases in his brief wherein the Courts have held that there was a systematic exclusion of a class (Negroes or otherwise) from jury service where there were no members of the class who were qualified jurors. Neither does our independent research reveal any case which the Court of Appeals might have used in the instant case to sustain its conclusions.

It is noted that the United States Supreme Court has invariably followed the aforesaid "rule of exclusion" in a long line of cases extending to the present time. Many of these cases are cited in the opinion of the Court of Appeals, and we shall deal here with each such case cited in the opinion individually.

As far back as the year 1881, this Court followed the said rule. In *Neal v. Delaware*, 1881, 103 U. S. 370, a Negro was indicted for rape, and his court-appointed counsel timely made motions to quash the indictment and the panels of jurors in the trial court, alleging as grounds therefor that citizens of the African race, *qualified in all respects to serve as jurors*, were excluded from the grand jury which indicted the accused and the petit jury which convicted him, because of their race or color; and that, in fact, persons of that race, *though possessing all the requisite qualifications* have always, in that county and state, been excluded because of their race from serving on juries. In that case, it was agreed between the State and the prisoner, by his counsel, with the assent of the trial court, that the statements and allegations in the petition for removal (which were the same as contained in the aforesaid motion to quash) should be taken and treated the same as if made by the prisoner in an affidavit. This Court there stated (p. 395):

> "No counter affidavits were filed in behalf of the prosecution. Nor does it appear that, on the hearing of the motions, the State controverted, in any form, the allegation, made with the utmost directness, *that her officers had purposely excluded from the juries, because of their color, citizens of the African race, qualified to perform jury service.*" (Emphasis supplied)

Thus, in view of the aforesaid facts of the *Neal* case, it is not difficult to understand how this Court arrived at the conclusion that the accused presented a prima facie case.

However, it can also be readily seen that the facts of the *Neal* case are vastly different from the facts in the case at bar. There the State admitted that there had been exclusion of qualified Negroes from jury service because of their race and color, while in this case petitioner has consistently denied such unlawful exclusion.

The *Neal* case is gone into here simply to show that even at that early date this Court took cognizance of the fact that th[illegible]e were members of the African race qualified to perform jury service, and, in view of its subsequent opinions as hereinafter enumerated, it must have considered that element essential to the making out of a prima facie case of unlawful exclusion.

In *Carter v. Texas*, 1900, 177 U. S. 442, 444, 447, the accused was indicted for murder. However, his counsel timely made a motion to quash the indictment prior to arraignment, said motion to quash reciting in part that Negroes, "*although otherwise qualified to serve as such grand jurors*, were excluded therefrom on the ground of their race and color . . ." (Emphasis supplied)

This Court stated in its opinion there that:

> "The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the State, must be supported by evidence on the part of the defendant. *Smith v. Mississippi*, 162 U. S. 592, 601; *Williams v. Mississippi*, 170 U. S. 213,"

and, since the trial court had refused to allow the accused to introduce witnesses to prove the allegations of the said motion to quash, this Court reversed the case and remanded in order to give the accused the opportunity to make such proof in support of his motion.

Here again, we find the affirmative allegation being made that members of the class alleged to be excluded were qualified to serve as grand jurors, as well as the offer of the accused to make such proof of exclusion because of race and color. Moreover, in that case we find this ~~Court~~ stating that the allegations "must be supported by evidence on the part of the defendant." In the instant case, there is no proof that there were Negroes qualified for jury service at the time respondent was indicted or at the time he was tried and convicted.

The case of *Norris v. Alabama*, 1935, 294 U. S. 587, involved a Negro who was accused and convicted of rape. At the outset, in the trial court, motions were made to quash the indictment and to quash the trial venire on the ground of the exclusion of Negroes from juries in that county. After the denial of those motions by the trial court and an affirmance by the Supreme Court of Alabama, the United States Supreme Court granted certiorari. In that case, this Court commented upon the Constitutional prohibition against the systematic exclusion of Negroes, *solely* because of their race or color, from serving on juries by citing the following language from *Carter v. Texas, supra* (p. 589):

> "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race *are excluded, solely because of their race or color*, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the

United States . . . The principle is equally applicable to a similar exclusion of negroes from service on petit juries.' " (Emphasis supplied)

We would mention at this point that it is impossible to conclude in any case that Negroes are excluded from serving as jurors *solely because of their race or color* unless proof is made that there are some Negroes in the county qualified for jury service. For the use of the word "solely" logically and manifestly contemplates the presence of all legal qualifications. It is clear that exclusion is prohibited only where Negroes or members of other established classes are not permitted to serve on juries *only* by reason of their race or color or because they belong to a particular delineated class.

In the *Norris* case, we also find that there were Negroes in the county that were qualified for jury service, this Court stating thus in its opinion (p. 596):

> "We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, *that there were negroes qualified for jury service*, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids." (Emphasis supplied).

Likewise in *Cassell v. Texas*, 1950, 339 U. S. 282, 298, Mr. Justice Clark's concurring opinion stated in part:

"... The record indicates clearly *that there were Negroes qualified and available* ..." (Emphasis supplied)

In *Reece v. Georgia*, 1955, 350 U. S. 85, a Negro was convicted of rape. Before his arraignment he moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury. In that case also, there were Negroes in the county who were qualified to serve on juries.

In *Farrow v. State*, 1908, 91 Miss. 509, 45 So. 619, the Negro accused made timely motions to quash the indictment and to quash the special venire, the motions stating that the Board of Supervisors had "failed and refused to select and list the names of any negroes whatever although there were then, and are now, on the registration books of voters in said *Tate county negroes* of good intelligence, sound judgment, and fair character, *competent and qualified for jury service under the laws of the state.*" (Emphasis supplied) The district attorney admitted the facts set out in said motions and no proof was taken in support thereof; whereupon, the trial court sustained the motion to quash the special venire and overruled the motion to quash the indictment, and, on appeal, the Supreme Court of Mississippi reversed and remanded it.

In *Patton v. Mississippi*, 1947, 332 U. S. 463, a Negro was indicted and convicted for murdering a white man in Lauderdale County, the adult population of which county was more than 35% Negro.

Patton filed a timely motion to quash the indictment, alleging that, although there were Negroes in the county qualified for jury service, they had been systematically excluded, thus denying to him equal protection of the laws under the Fourteenth Amendment. The uncontradicted proof was that no Negro had served on the grand or petit criminal court juries for thirty years or more.

The case being before this Court on certiorari, in its opinion reversing the judgment of the Mississippi Supreme Court and remanding the same for proceedings not inconsistent with the opinion, this Court stated in part (p. 468):

> "... *whatever the precise number of qualified colored electors in the county, there were some;* and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write, or to meet any other or all of the statutory tests, we do not doubt that the State could have proved it." (Emphasis supplied)

Upon remand, Patton was afforded a new trial by a jury from which members of his race had not been systematically excluded, and when the case again appeared before the Mississippi Supreme Court, *Patton v. State*, 1949, 207 Miss. 120, 127, 40 So. 2d 592, 593, cert. den. 338 U. S. 855, the record disclosed that local officers had combed the meager roster of qualified Negroes who had seen fit to register, and the ratio of Negroes summoned under the venire facias was higher than the ratio of Negroes on the voter registration books. In its opinion there, the Mississippi Supreme Court used the following language:

> "It would unjustly discredit this Court to assume that it lacked an awareness of the constitutional prohibitions against discrimination in such cases as an infringement of the due process and equal protection clauses. Long prior to the emergence of causes celebres which have been headlined as heralds of a rediscovery

of civil rights, this Court boldly condemned a purposeful discrimination against Negroes in the matter of jury service. Farrow v. State, 91 Miss. 509, 45 So. 619. See also Hampton v. State, 88 Miss. 257, 40 So. 545, 117 Am. St. Rep. 740. Eighty years ago this State pioneered in the use of Negroes on grand and petit juries. Lee v. State, 45 Miss. 114. In the first appeal, Patton v. State, 201 Miss. 410, 29 So. 2d 96, we were constrained to hold that a witting exclusion of Negroes as such from the jury lists was not deducible from the circumstances that negroes had not in the past actually served on juries in Lauderdale County."

As further evidence of the determination of the Supreme Court of Mississippi to apply in proper cases the true "rule of exclusion"—which makes it mandatory that there be members of the class alleged to be excluded who are qualified for jury service within the area from which the jurors are selected—we submit the case of *McGee v. State*, 1948, 203 Miss. 592, 33 So. 2d 843. In the *McGee* case, a Negro was indicted for rape. His counsel had filed a timely motion to quash the indictment on the ground that Negroes had been systematically excluded from the grand jury because of their race. Although the trial court overruled said motion to quash and McGee was convicted, the Mississippi Supreme Court reversed and remanded the case, holding that the Circuit Court of Jones County erred in not quashing the indictment, stating in its opinion (p. 844) that:

> "The evidence here discloses that no Negroes were on the grand jury that indicted the appellant and that no Negroes had served on the grand and petit juries of Jones County for a long number of years, if ever, *although there were at all times in the county Negroes, though few in number, who were qualified for jury*

service . . . It follows, therefore, unless we are to disregard the decisions of the Supreme Court of the United States, which we are without the right to do, we must hold that the Circuit Court of Jones County erred in not quashing this indictment . . ." (Emphasis supplied)

If, in the instant case, there had been proof that there were Negro qualified electors in the Second Judicial District of said County, perhaps the Court of Appeals would have been justified in placing a burden upon petitioner to prove that they failed to meet one or more of the other statutory qualifications. But in the case at bar respondent offered no proof that any Negroes possessed any of the statutory qualifications for jury service, although it would have been simple for him to prove that there were Negroes in said Second Judicial District who were qualified electors if there had been any.

In *Akins v. Texas*, 1945, 325 U. S. 398, 405, before this Court on certiorari, a Negro had been convicted and sentenced to death for murder. The accused complained of discrimination consisting of an arbitrary and purposeful limitation by the grand jury commissioners of the number of Negroes to one who was placed on the grand jury panel of sixteen for the term of Court at which the indictment against him was found. The opinion of this Court, affirming the conviction, contained the following language:

> "About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. *A substantial percentage of them are qualified to serve as grand jurors.*" (Emphasis supplied)

In *Eubanks v. Louisiana*, 1958, 356 U. S. 584, 586, 587, which was before the Supreme Court on certiorari, the accused, a Negro, had been indicted for the murder of a white woman by an all-white grand jury in Louisiana. His motion to quash the indictment on the ground that Negroes had been systematically excluded from grand juries in the parish, including the grand jury which returned the indictment against him, which had been timely filed, was overruled. He was tried, convicted and sentenced to death. This Court stated in its opinion that although Negroes comprised about one-third of the population of the parish, the uncontradicted testimony of the various witnesses established that only one Negro had been picked for grand jury duty within memory, and he by mistake apparently. The opinion further stated that:

> "Undisputed testimony also proved that a substantial number of the large Negro population in the parish *were educated, registered to vote and possessed the qualifications required for jury service* . . ." (Emphasis supplied)

In all of the cases that the writers of this brief have been able to find wherein the courts have held that there has been systematic exclusion of a delineated class as grand or petit jurors, the courts have stated in their opinions that there were members of the excluded class who were qualified to serve as jurors. And, in so holding, it is apparent to us that the courts had in mind the mandate of Congress in Title 18, United States Code, Section 243, which reads as follows:

> "Exclusion of jurors on account of race or color."
>
> "No citizen *possessing all other qualifications which are or may be prescribed by law* shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being

an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.00." (Emphasis supplied)

Thus, in the instant case, the respondent having failed to prove that there were Negroes in the Second Judicial District of Carroll County, Mississippi, where his trial was held, who were qualified jurors at the time of his indictment or trial, did not make out a prima facie case which the petitioner was called upon to refute.

The Court of Appeals in its opinion (App. A, p. 70) acknowledges that under the laws of the State of Mississippi a person must first be registered to vote in order to be eligible for jury duty, and also acknowledges (App. A, p. 71) that the only Negroes proved registered as electors in Carroll County were two who had died before 1954.

While the authority of the State of Mississippi to impose requirements which its citizens must meet before being eligible for jury duty is not challenged, the following statement in the Court's opinion in *Strauder v. West Virginia*, 1880, 100 U. S. 303, 310, with regard to the authority of the States in this connection may be helpful:

> "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we

have said more than once; its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it."

Section 264, Mississippi Constitution of 1890, provides that "No person shall be a grand or petit juror unless a qualified elector and able to read and write . . . ," and that the Legislature shall provide the method for procuring a list of persons so qualified. In compliance with that constitutional mandate, the Mississippi Legislature has enacted Chapter 9 of Title 10, Mississippi Code of 1942, Recompiled, entitled "Juries." Appearing at the beginning of said Chapter 9 is Section 1762 which provides that in order to be competent to serve as a juror one must be, inter alia, a male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write.

The question then presents itself: Who is a qualified elector in Mississippi? Sections 241, 242, 243 and 244 of the said Mississippi Constitution set forth prerequisites for qualified electors. Among the prerequisites enumerated are that each elector shall be duly registered, that he shall have paid all poll taxes which may have been legally required of him for the two preceding years (poll taxes being due annually) and said Section 244, prior to its amendment in the year 1955, required that every elector shall be able to read any section of the Constitution of the State of Mississippi; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof.

There is *no proof* in the record here that there were *any Negroes* in the Second Judicial District of said Carroll County, or in the county as a whole for that matter, *who met any of the prerequisites* for qualified electors or jurors. While there was some testimony about the payment of taxes by the Negroes who testified at the hearing, there is no proof in the record to the effect that any Negro had paid at the time of respondent's trial all poll taxes required of him by law for the two preceding years.

Moreover, the record is silent as to any proof that any Negroes had even presented themselves for registration at the office of the Circuit Clerk and Registrar, with the exception of one Willie Burkhead. And his situation is partially explained by his testimony at the hearing, which testimony may be supplemented by the judicial knowledge which this Court can take of the laws of the State of Mississippi, thus making the picture of what transpired, and why, complete.

The said Willie Burkhead testified (R. 124) as follows:

"Q. Why aren't you a registered voter in Carroll County?

"A. I never did register.

"Q. Did you ever try to register?

"A. I did. I asked the clerk if he had any objections, and he said personally he didn't, but there was some kind of a law that they had in Mississippi at that time that wasn't allowing anyone to register."

It is apparent that the "law" to which Willie Burkhead made reference was actually a hiatus in the voter registration laws of Mississippi which existed from January 26, 1955, to March 24, 1955. An amendment to Section 244 of the Mississippi Constitution of 1890, revising the requirements for registering to vote, was approved by the qualified electors of the State at an election held in November, 1954. On January 26, 1955, said proposed amendment was inserted into the Constitution by the Legislature, and thus became effective on that date. The amendment, however, was not self executing, and it was necessary that the Legislature enact legislation implementing the amendment and providing the procedure by which persons might thereafter constitutionally register to vote. Such implementing legislation was approved on March 24, 1955, and the Attorney General of Mississippi has rendered numerous opinions holding that all attempted registrations between January 26, 1955, and March 24, 1955, are invalid, and, in fact, so advised all of the Circuit Clerks and Registrars of the State of Mississippi prior to the enactment of the aforesaid enabling legislation. We presume that this Court will take judicial knowledge of the fact that said amendment to Section 244 of the Mississippi Constitution was inserted into said Constitution by Chapter 133, General Laws of the 1955 Extraordinary Session of the Mississippi Legislature (House Concurrent Resolution No. 9) which was adopted on January 26, 1955, and also the legislation implementing said constitutional amendment; this being Chapter 102, General Laws of the 1955 Extraordinary Session of the Mississippi Legislature, which became effective March 24, 1955.

In addition, there is no proof, or even an intimation, in the record that any Negro, or anyone else, was hindered or prevented from becoming a qualified elector or juror or was intimidated in any way by anyone in an effort to keep him from attempting to register or from complying with any other prerequisite to becoming a qualified elector or juror.

In this same connection, we must respectfully but strenuously take issue with the following presumption drawn by the Court of Appeals (App. A, pp. 70, 71):

> "We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors and, by such action, had rendered themselves ineligible for jury duty. If the registration officials freely and fairly registered qualified Negroes as electors, that fact rested more in the knowledge of the State."

For we respectfully contend that said language does violence to the well established and long accepted presumption that, in the absence of evidence to the contrary, public officers have acted faithfully and in accordance with law.

In *Akins v. Texas, supra*, this Court stated (pp. 400, 401):

> "An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the requirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice."

Likewise, in *Darr v. Burford*, 1950, 339 U. S. 200, 218, this Court used the following language in its opinion:

> "A conviction after public trial in a state court by verdict or plea of guilty places the *burden on the accused to allege and prove primary facts, not inferences*, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused." (Emphasis supplied)

In *Goldsby v. State*, 1956, Miss. 86 So. 2d 27, 32, the Court quoted from 50 *C. J. S., Juries, Section* 265, at page 1026, as follows:

> "'It will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is on the challenging party.'"

Thus, the established rule is clear—a mere allegation of discrimination is not enough. The burden of proving discrimination is on the one making the allegation, and the proof in the instant case falls far short of meeting that burden.

The criticism directed by the Court of Appeals at the petitioner herein for failure to rebut the respondent's case by the testimony of registration officials (App. A, p. 71):

> "If the registration officials freely and fairly registered qualified Negroes as electors, that fact rested more in the knowledge of the State. The burden was on appellee as the State's representative to refute the strong prima facie case developed by the appellant. The only Negroes ever proved registered as electors in Carroll County were two who had died before 1954."

seeks to contradict the rule consistently followed by this Court to the effect that the burden of proving discrimination is on the one making the allegation. Here the absence of such proof stands out like a sore thumb, and such was the finding of fact by United States District Judge Clayton.

Furthermore, we respectfully submit that the proof in the instant case does not sustain the following statement appearing in the opinion of the Court of Appeals (App. A, p. 72):

> "... there is added to our common knowledge proof that some of the Negro citizens are qualified educationally and by other legal standards but are excluded from serving as jurors solely because of their race or color ..."

We respectfully submit that while the County Superintendent of Education, Mr. Lovell, testified (R. 120, 121) that in the year 1954 "less than 50" Negroes graduated from the high schools of Carroll County, there is no proof whatever in the record that any of those Negro high school graduates ever offered to register as qualified electors or remained in that County and were there at the time of respondent's trial. Moreover, the record is silent as to the ages of any of said Negro high school graduates, and, in the absence of proof to the contrary, we believe it is reasonable to assume that none of them were twenty-one years of age or over. Also, the laws of the State of Mississippi do not provide that a high school diploma in the hands of an applicant automatically entitles him to register to vote; at the same time, no applicant for registration is required to be a high school graduate. We fail to find any proof in the record to indicate that at the time of respondent's trial there were any Negroes in the County who had paid the poll taxes required of them or who were qualified educationally or by any other legal standards, and particularly by registration, to serve as jurors.

Having cited many cases from the long, unvarying line in which this Court has followed the "rule of exclusion" and wherein the proof invariably revealed that there were Negroes qualified for jury service, we now turn to authorities confronted with factual situations where it was not shown that any Negroes were qualified to serve as jurors.

In *Jackson v. State*, 1902, Texas Crim. 71 S. W. 280, the appellant made a motion to quash the indictment in the trial court on the ground that there were no Negroes summoned to serve on the jury and that no Negroes had been selected for twenty years to serve on juries in the county. The Court held that there was no error in the failure of the trial court to quash the indictment where, inter alia, it appeared that there was no proof that there were any qualified jurors in the county among the Negro race.

In *Mitchell v. States*, 1937, 132 Tex. Crim. 491, 105 S. W. 2d 248, 249, a Negro had been convicted of murder. The accused made a motion in the trial court to quash the indictment on the ground that he had been discriminated against in the selection of a grand jury. It appeared from the testimony heard on the motion that for more than forty years no Negro had been selected by the jury commissioners except on one occasion, and then he had been excused by the court. The record showed that Taylor County had a population of approximately 38,000, of whom about 1600 were Negroes. The Court used the following language in its opinion:

> "Whether any of the negroes possess the statutory qualifications for grand jury service was not shown. *Hence the case of Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed 1074, *cited by appellant is not deemed controlling.* As the matter is presented in the present record, the opinion is expressed that the motion to quash was properly overruled." (Emphasis supplied)

A Negro was convicted of murder in *Butcher v. State:* 1948, Tex. Crim. 208 S. W. 2d 899. He made a motion in the trial court to quash the indictment, alleging that members of the Negro race had been systematically and arbitrarily excluded from grand jury service in Hutchinson County for many years. The only supporting proof in the record relative to such matter set up in the motion to quash was a stipulation agreed to by both the district attorney and the appellant to the effect that no colored person had ever served on the grand jury in said county during the district attorney's service as such officer and that there had been a colored population of five to six hundred in the county during such time. In its opinion holding that the trial court was correct in overruling the motion to quash, the Court of Criminal Appeals cited the following language of the trial court:

> " 'There was nothing presented to the Court, in connection with said motion, to reflect what number, if any, of the colored race in Hutchinson County, were eligible as provided by statute, to serve on the Grand Jury which returned the Bill of Indictment for which the defendant was on trial.' "

The question is not and cannot be whether Negroes were *excluded* because of their failure to register to vote or were *excluded* because they failed to pay the required poll taxes or were *excluded* because they failed to meet the literacy requirements or were *excluded* because they were not of proper age or failed to meet the proper residence requirements. For this Court has held that the aforesaid requirements are valid, and should any person, whether Caucasian, Mongolian or Negro, fail to meet any of the foregoing prerequisites he necessarily would be ineligible for jury service because he could not be a qualified elector. See *Gibson v. Mississippi*, 1896, 162 U. S. 565, and *Williams v. Mississippi*, 1898, 170 U. S. 213. The "rule of exclusion" contemplates that all legal requirements for eligibility for jury service shall have been met. Thus, the issue which we are confronted with here is whether Negroes were systematically excluded from jury service in the Second Judicial District of Carroll County *solely because of race or color.* And it is evident from the above authorities that a motion to quash an indictment in a case such as the one at bar on the ground of systematic exclusion of Negroes from grand jury service because of race or color will not lie where there is no proof that there were any qualified jurors among the Negro race. The same rule applies with equal force where an attack is made upon the petit jury panel on the same ground. In the instant case, there is absolutely no proof in the record that there were either qualified Negro grand jurors or petit jurors in the county.

Before the aforesaid "rule of exclusion" can be applied there first must be a showing that there was someone to exclude. There must be proof that there were qualified members of the delineated class available for jury duty, and this the respondent wholly failed to prove. Thus, we respectfully submit that the respondent did not prove a prima facie case that his constitutional rights under the due process clause or the equal protection clause of the Fourteenth Amendment to the Federal Constitution, or otherwise, were violated by virtue of the fact that Negroes were systematically excluded from the grand jury or petit jury. Hence neither the burden of proof nor the burden of going forward shifted to the petitioner.

III

RESPONDENT EFFECTIVELY WAIVED HIS RIGHT TO OBJECT TO THE PETIT JURY WHICH CONVICTED HIM ON THE GROUND THAT NEGROES HAD BEEN SYSTEMATICALLY EXCLUDED THEREFROM IN VIOLATION OF THE FEDERAL CONSTITUTION.

We respectfully submit that the uncontradicted record reveals that respondent was ably represented by competent counsel at his trial and upon the appeal from his conviction to the Mississippi Supreme Court, and there can be no presumption to the contrary.

The Mississippi Supreme Court, in its opinion denying respondent's petition for leave to file a writ of error coram nobis and refusing to issue a writ of habeas corpus, *Goldsby v. State*, 1956, Miss., 86 So. 2d 27, 31, made the following laudatory remarks regarding the manner in which Attorneys John W. Prewitt, as counsel employed by respondent's family, and Rupert Ringold, appointed by the court to defend respondent, represented respondent in the trial and appeal of his case:

> ". . . a review of the record of the trial of this case shows that both of these attorneys, who are thoroughly competent and who stand high among tha legal profession in Mississippi, did an excellent job in the defense of this case, not only at the trial in the lower court but also on the appeal to this Court."

To the same effect are the following excerpts from the testimony of Honorable Henry Lee Rodgers, the presiding judge at respondent's trial, when he testified in the United States District Court at the hearing on respondent's petition for writ of habeas corpus (R. 205, 206):

> "Now Mr. Pruitt [Prewitt] was one of Mississippi's best criminal lawyers, and I was really astonished and amazed at his ability. He is one of Mississippi's great criminal lawyers . . . he [respondent] certainly was ably represented, and I think the record will show that Mr. Pruitt [Prewitt] and Mr. Ringgold made a wonderful showing . . . they put up a very good defense, if I may say so."

Also, the following statement appears in the testimony of Honorable John E. Aldridge, the district attorney who represented the State in prosecuting the respondent (R. 217):

> "I have known of Mr. Pruitt [Prewitt] up to that time; however, I had never been in a trial with him, but I found he was one of the most able adversaries and counsellors that I had been in court with, and he undoubtedly was a very able lawyer, and he and Mr. Ringgold fought hard throughout this trial . . . They fought from the beginning to the end of it."

In fact, even respondent's aunt (R. 179) felt compelled to admit that Mr. Prewitt is an outstanding lawyer and is recognized and considered one of the best attorneys in the City of Vicksburg where he is engaged in the practice of law. In addition, Honorable Claude F. Clayton, United States District Judge, included the following statement in his oral opinion denying respondent's petition for writ of habeas corpus (R. 224):

> ". . . that he [respondent] was represented by able and competent counsel of his family's selection and employment throughout the trial and in the Supreme Court of Mississippi on appeal, and that in addition he was represented by able counsel appointed by the Circuit Court of Carroll County."

The Court of Appeals, likewise, complimented respondent's said counsel in its opinion herein (App. A, p. 61) by stating that:

> ". . . both Ringgold and Prewitt defended the appellant skillfully and ably . . ."

but with the following qualifying remark: ". . . with the possible exception that they failed to raise the points that Negroes were systematically excluded from the grand jury and from the petit jury."

We respectfully submit that the record in this case, interpreted in the light of authorities dealing with the duty and responsibility of an attorney toward his client, some of which shall be hereafter considered in this brief, leaves no room for qualification of the statement that Attorneys Prewitt and Ringold ably defended respondent.

Counsel is presumed, in the absence of proof to the contrary, to have acted from proper motives and with the best interests of his client always foremost in his mind throughout the conduct of his client's defense. *Simmons v. State*, 1944, Miss., 20 So. 2d 64, 65, cert. den. 324 U. S. 821. In this case, however, we need not rely solely upon this logical presumption, for we have the testimony of the trial judge and the district attorney who prosecuted respondent who spoke in glowing terms concerning the extraordinary ability possessed by respondent's trial counsel and also the exceptional zeal and diligence which said counsel displayed in presenting respondent's defense at his trial. And there is no proof in the record to indicate anything to the contrary. Moreover, the Supreme Court of Mississippi, in its opinion in *Goldsby v. State, supra*, commended trial counsel for their excellent defense of respondent. Honorable Claude F. Clayton, United States District Judge, was likewise complimentary of trial counsel. And we believe that this Court should give substantial weight to these unqualified commendations of trial counsel's presentation of respondent's defense.

In *Akins v. Texas, supra*, this Court stated that great respect should be given to the conclusions of the state judiciary (pp. 401, 402):

> "While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama*, 294 U. S. 587, 589-90; *Smith v. Texas*, 311 U. S. 128, 130, *we accord in that examination great respect to the conclusions of the state judiciary, Pierre v. Louisiana*, 306 U. S. 354, 358." (Emphasis supplied)

In the opinion of the Court of Appeals (App. A, p. 80) it is stated:

> "In this case, neither of the petitioner's [respondent's] trial attorneys has appeared or has been called to testify to any reason for waiving his client's constitutional right to a legally constituted trial jury, and no good reason appears otherwise from the record."

We, of course, agree with this statement of fact. But we respectfully submit that if anyone should have called said trial counsel to testify, it was the respondent. We do not believe that it was the proper place of the petitioner to call upon respondent's trial attorneys to testify. For, in the first place, all of the proof and the findings by both the Mississippi Supreme Court and the United States District Court showed unequivocally that respondent's said trial counsel were competent and that they handled respondent's defense in an excellent manner, and, there being no proof to the contrary, the petitioner herein had no need for testimony of said trial counsel to bolster his position. In the second place, even if the communication were not privileged, we are inclined to question the propriety of the State calling former defense counsel to testify in a case of this kind. For in order for the testimony of such trial counsel to be of benefit to petitioner herein, it would have had to be such as to indicate that there was an intelligent and effective waiver of respondent't right to object to the grand and petit juries. Such testimony, of course, would have acted to the detriment of the respondent, the former client of the witnesses, and thus proved embarrassing to such counsel, and might well be without the bounds of propriety on the part of the State.

On the other hand, if in truth and in fact respondent or his present counsel had been convinced that there was no waiver of respondent's constitutional rights, it would have been altogether proper for them to call Mr. Prewitt and Mr. Ringold to testify under oath at the hearing—and they could have done so. Both of these attorneys have continued to practice law in the same cities where they were practicing when they defended the respondent. They were accessible—but they were not called to testify on behalf of the respondent. Why? We may only assume that respondent and his present counsel were convinced that the testimony of said trial counsel would not have been helpful to respondent's cause of trying to establish the lack of an effective waiver.

We submit that the respondent's burden of proof in the instant case to show that his constitutional rights had not been effectively waived was not unlike the burden cast upon the petitioner in *Johnson v. Zerbst, supra*, thus stated in this Court's opinion there (p. 469):

> "In this case, petitioner was convicted without enjoying the assistance of counsel. Believing *habeas corpus* was not an available remedy, the District Court below made no findings as to waiver by petitioner. In this state of the record we deem it necessary to remand the cause. *If—on remand—the District Court finds*

> *from all of the evidence that petitioner has sustained the burden of proof resting upon him and that he did not competently and intelligently waive his right to counsel,* it will follow that the trial court did not have jurisdiction to proceed to judgment and conviction of petitioner, and he will therefore be entitled to have his petition granted. *If petitioner fails to sustain this burden, he is not entitled to the writ.*" (Emphasis supplied)

It is clearly apparent in the case at bar that respondent has wholly failed to sustain the burden resting upon him of proving the lack of an effective waiver.

The following statements are found in the opinion of the Court of Appeals (App. A, p. 79):

> "Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism.
>
> "As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."

With all deference to said Court, we submit that the facts reveal a lack of reluctance on the part of Mississippi lawyers to raise this Constitutional question, and that the raising of such question apparently has not caused any of the attorneys who have raised it any loss of practice or social ostracism. Moreover, the facts further reveal that the Supreme Court of Mississippi has no hesitancy in reversing a case of this kind when such question has been timely raised and proper proof made in support thereof. In support whereof, we here cite to the Court several instances where this question has been raised in recent years.

Among them is the case of *McGee v. State, supra,* a much publicized case which was litigated in the State and Federal Courts for several years.

Prior to the trial, Willie McGee's counsel, Honorable Dixon L. Pyles and Honorable Dan E. Breland, made a motion to quash the indictment on the ground that Negroes were excluded from the grand jury on account of their race. Both of said attorneys were at that time and are now engaged in the general practice of law in the City of Jackson, Mississippi. They are highly respected lawyers and citizens of that city, both of them apparently enjoy lucrative practices, and there are no signs of social ostracism directed toward them. In fact, Mr. Pyles is the present President of the Conference of Local Bar Associations of Mississippi.

Honorable F. F. Mize of Forest, Mississippi, a brother of the Judge of the United States District Court for the Southern District of Mississippi, and a member of a family long prominent in legal and political circles in this State, raised the aforesaid constitutional question in *Flowers v. State*, 1949, 209 Miss. 86, 41 So. 2d 352, cert. den. 339 U. S. 946. Mr. Mize has been and remains a highly esteemed and respected lawyer and citizen in his home community and state.

In *Seay v. State*, 1951, 212 Miss. 712, 55 So. 2d 430, the aforesaid constitutional question was raised by Honorable Ely B. Mitchell, deceased, late of Corinth, Mississippi, an eminent and respected attorney in Mississippi during his entire long career at the bar of this State. Seay was a Negro charged with felonious assault upon the then sheriff of Tishomingo County, Mississippi. Mr. Mitchell timely made a motion to quash the indictment on the ground that Negroes had been systematically excluded from grand and petit jury service in that County solely because of race or color. He proved that there were Negro qualified electors in Tishomingo County, and that for a number of years prior to the trial, and at the time the motion to quash was considered, there were Negroes qualified for jury duty in that County, but that no Negroes had been called for jury duty. The trial court overruled Seay's motion to quash the indictment. Seay was tried and convicted of the crime charged, and the Supreme Court of Mississippi, upon appeal, reversed and remanded, citing *Patton v. Mississippi, supra, Neal v. Delaware, supra, Norris v. Alabama, supra,* and other United States Supreme Court cases as authority therefor.

In *Cameron v. State*, 1958, Miss., 102 So. 2d 355, appellant's counsel who raised the said constitutional question were Honorable Emmette P. Allen and Honorable James F. Noble of Brookhaven, Mississippi, the community in which the alleged crimes occurred. The appellant, in a series of assaults and rape, had terrorized the City of Brookhaven and was named by the newspapers "the Mumbler." Nevertheless, both of said attorneys who were and still are prominent in their community, and who were court appointed, raised the question of systematic exclusion of Negroes from the jury panels. Both of these attorneys are well known to the writers hereof, and we know of no reprisals or social ostracism against either of them. We know it to be a fact that Mr. Allen has been a member of the local school board in his community, and is presently the attorney for said school board. Mr. Noble was elected Vice President of the Junior Bar Section of the Mississippi State Bar in May, 1958, after he had raised the aforesaid constitutional question and that he presently occupies that position of honor.

We respectfully submit that our contention that the failure of respondent's able and experienced trial counsel to timely make objection to the petit jury which convicted him on the ground that Negroes had been systematically excluded therefrom constituted an effective waiver of respondent's constitutional rights in this regard is sustained by the holding in *United States ex rel. Jackson, et al v. Brady*, 4th Cir. 1943, 133 F. 2d 476, cert. den. 319 U. S. 746. In that case, three Negroes were tried and convicted of first degree murder and sentenced to death. They being without means to employ counsel, the court appointed three able and experienced lawyers, one for each of the defendants. At the beginning of the trial, defense counsel challenged the array on the ground that the jury had not been selected in accordance with the Constitution of the United States or the Constitution and laws of Maryland, pointing out that, of fifty-two jurymen submitted to them, only two were colored. No evidence or argument was offered to sustain the charge, and it was overruled by the court. There, no objection was made at any time during the trial or in the appellate court as to the mode of selection of the grand jury. The case was before the Court of Appeals on appeal from the action of the United States District Court in denying the petition for writ of habeas corpus filed therein, wherein the defendants contended that they were deprived of their constitutional rights at the trial in that there was racial discrimination in the selection of the grand jury which indicted and the petit jury which convicted them. In its opinion, which affirmed the decision of the District Court, the Court of Appeals for the Fourth Circuit used the following language (pp. 478, 480, 481):

"The District Judge found from the evidence the ultimate fact 'that there has been no intentional and systematic exclusion of Negroes from juries in Baltimore City; and no discrimination against them in practice on account of race and color in the selection of jurors by the Supreme Bench of Baltimore City': and he reached the conclusion of law that the petition for the writ of habeas corpus should be dismissed (1) on the substantial ground 'that racial discrimination against Negroes for jury service had not been shown, and (2) on the procedural ground that the petitioners, when represented by competent counsel in the trial of their case in the state court, did not interpose any objection to the constitution of the Grand Jury; and did not submit any evidence in support of their charge of racial discrimination against Negroes in the composition of the Petit Juries and therefore must be held to have waived that objection.

. . . . .

"The second ground upon which the decision below was based was also well taken, that is, the defendants in the Criminal Court made no effort to sustain, and, therefore, *waived the charge of racial discrimination* after they had presented it. As we have seen, the defendants made no objection whatever in the Criminal Court to the constitution of the Grand Jury, and confined their objection to the Petit Jury to an oral challenge of the array on the ground that the jurors had not been selected in accordance with the Constitution, because only two of the fifty-two jurors submitted for membership on the trial panel were colored. No further offer of proof and no argument to support the challenge were made. The bare recital of these facts demonstrates that nothing was shown at the trial in the Criminal Court to justify a ruling that the jury was disqualified on constitutional grounds.

. . . .

"The facts presented to the District Court on hearing on habeas corpus were not hidden or unknown at the time of the trial in the Criminal Court. They were as easily accessible when the charge of racial discrimination was formally made during the selection of the jury as they were later; and *the failure of experienced counsel, for reasons of their own, to offer the necessary proof to support the charge was as deliberate and effective a waiver as if the point had not been made at all. That a defendant, especially when represented by counsel, may make a competent and intelligent waiver of a constitutional right binding upon him is well established by repeated decisions.*" (Emphasis supplied)

In *Mitchell v. United States*, D. C. Cir., 1958, 259 F. 2d 787, 793, a defendant, who had been convicted of carnal knowledge of a seven year old girl several years before, filed a motion to vacate the sentence on the ground that he was denied "effective assistance of counsel" as guaranteed by the Sixth Amendment to the Federal Constitution. He filed the motion under 28 U. S. C. A., Section 2255. He had been defended by court appointed counsel. Three principal reasons were cited by the Court for affirming the District Court's denial of the motion without a hearing: (1) If the trial judge understood that after the trial each of the defense counsel's trial decisions would have to be reviewed, the judge could not remain "impartial"; (2) the judge's obligation to protect the accused's rights during the trial would substitute the judge's judgment for the lawyer's; and (3) to permit such motions would terminate the representation of indigent criminals by the bar, and thus "[o]ne of the great protections of the unfortunate would be gone, destroyed not by the bar but by the courts."

Likewise, we believe that not only will the decision of the Court of Appeals herein work an injustice in the case at bar, but that it will be laying the groundwork for future problems as outlined in the *Mitchell* case.

The case of *Carruthers v. Reed,* 8th Cir., 1939, 102 F. 2d 933, 937, 938, cert. den. 307 U. S. 643, is very similar to the case at bar, and the legal principles therein resolved are controlling here. In that case, Carruthers and another Negro were convicted of rape and sentenced to be executed. After the case was affirmed by the Arkansas Supreme Court and after a petition for rehearing and a petition for leave to apply to the trial court for a writ of error coram nobis were denied by said State Supreme Court, said case was heard on a petition for writ of habeas corpus, as amended. Among the grounds for the habeas corpus applied for in the District Court was the contention that Negroes were systematically excluded on account of their race from the panel of the grand jury which found the indictment and from the petit jury which rendered the verdict. With regard to this contention, the Court stated in its opinion:

> "There is substantial evidence that negroes had been systematically and intentionally excluded from the panels of both the grand jurors and petit jurors in Mississippi County over a period of years, although there were among the population many persons of that race qualified for such service under the Arkansas statutes."

At this point, we pause to say that on the proposition of systematic exclusion of Negroes from jury service, the facts of the *Carruthers* case as above mentioned were much more favorable to the prisoners than are the facts in the case at bar. For in the instant case there is no showing that there were Negroes qualified to sit on either the grand jury which indicted the respondent or the petit jury which tried him.

In the *Carruthers* case, the Court of Appeals for the Eighth Circuit further stated in its opinion (pp. 938, 939):

> "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they have voluntarily discarded and waived. Johnson v. Zerbst, supra, Syl, No. 2, p. 548, 58 S. Ct. p. 1019. Full opportunity having been afforded the appellants to apply to have the jury panel quashed and to have negroes summoned on a new jury panel, they could not deliberately withhold their application for such procedure and then be heard after conviction to assert on habeas corpus that their conviction was void. Such is not the function of the writ of habeas corpus. In the situation presented there was no denial of judicial remedy; therefore, there was no denial of equal protection nor of due process of law. The decision of their counsel learned in the law, an attorney of judgment, experience and discretion, that their interests would not be furthered by filing the application, was binding upon the appellants and no inference can be drawn in view of the testimony on the trial that there was even a mistake of judgment chargeable to the attorney.
>
> . . . .
>
> "The right to challenge the panel is a right that may be waived and is waived if not seasonably presented.

Such rights, if waived during trial, may not be availed of by attack in a collateral proceeding. Bracey v. Zerbst, 10, Cir., 93 Fed. 2d 8."

In *Carruthers*, the denial of the application for writ of habeas corpus by the Court below was affirmed. We respectfully submit that the same result should follow here.

In *United States ex rel. Smith v. Baldi*, 1953, 344 U. S. 561, 568, a habeas corpus case where the petitioner was a convicted murderer under death sentence, the Court stated in its opinion affirming the denial of the petition that:

> "A claim of denial of due process can hardly be predicated upon the failure of a defense move."

We next submit for the consideration of the Court two cases, *Michel v. Louisiana*, 1955, 350 U. S. 91, and *Brown v. Allen*, 1953, 344 U. S. 443—where, because of technical procedural errors of counsel, this Court refused to consider objections to the juries on the ground that there was a systematic exclusion of Negroes from the panels, although the question in each case was raised prior to trial.

In the *Michel* case, the petitioners were all Negroes sentenced to death for aggravated rape. They made no attack on the composition of the petit jury nor on the fairness of their trials, but challenged the composition of the grand juries which indicted them on the ground that there was a systematic exclusion of Negroes from the panels. No hearing was held on these allegations since the lower courts found that the question had been waived by virtue of the fact that it was not raised before the expiration of the third judicial day following the end of the grand jury's term as required by Louisiana law. Michel's counsel was appointed on March 2, 1953, this being also the day that the term of the grand jury which indicted Michel expired. Michel's motion to quash the indictment was filed on March 9—seven calendar days after the expiration of the term of the grand jury. The State demurred on the ground that it came too late. The United States Supreme Court agreed that the right to raise the question had been waived, and in its opinion used the following language (p. 96):

> "Since we find that counsel, a lawyer experienced in state criminal practice, had adequate time to file the motion after his appointment, we hold that the application of Section 202 [the Louisiana statute limiting the time for filing such objection] in this case was not unreasonable."

Furthermore, this Court had this to say about Michel's codefendant Labat. Labat was apprehended on the evening of the crime, indicted December 11, 1950, and arraigned on January 3, 1951, and pleaded not guilty. On January 5 the Court appointed Mr. Mahoney as counsel for him. Thereafter the status of the case remained unchanged for more than a year. The next entry is dated January 29, 1952, when Mr. Mahoney asked leave to withdraw. Mr. Gill was thereafter employed, and on June 12, 1952, moved for a continuance. Labat filed his motion to quash the indictment on November 7. The term of the grand jury that indicted Labat had expired in March, 1951. In its opinion the Court made the following statement regarding Labat (pp. 100, 101):

> "Petitioner now contends that he was denied effective representation of counsel. *Powell v. Alabama*, 287 U. S. 45. Mr. Mahoney had a reasonable time in which to file his motion to quash, but did not do so. It was stated on oral argument that he was 76 or 77 years old when he took the case, and was ill in bed during several

> months of the year. *The trial court and the Supreme Court of Louisiana held that the facts did not show a lack of effective counsel. As in No. 32, Michel's case, we accept these findings.* There is little support for the opposite conclusion in the record. Mr. Mahoney was a well-known criminal lawyer with nearly fifty years' experience at the bar. There is no evidence of incompetence. *The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness. Feeley v. Ragen,* 166 F. 2d 976. The delay might be considered sound trial strategy, particularly since the codefendant could not be found." (Emphasis supplied)

In *Brown v. Allen, supra,* it appeared that in the companion case of *Daniels v. Allen,* No. 20, decided on appeal with the *Brown* case, the two petitioners, Negroes, were convicted of murder and sentenced to death. They had at all times counsel chosen by themselves and recognized by North Carolina as competent to conduct their defense. Petitioners, at the State trial made a timely motion to quash the indictment and challenged the array, alleging discrimination against Negroes in the selection of both grand and petit jurors in contravention of the Fourteenth Amendment. However, counsel was *one day late* in perfecting an appeal to the State Supreme Court, and although the North Carolina Supreme Court could have, in its discretion, considered the appeal, it failed and refused to consider the same. An appeal as of right to the State Supreme Court, however, was precluded by failure to perfect the appeal within the prescribed statutory time.

In this Court's opinion which refused to overturn the holding of the North Carolina Supreme Court, we find this significant statement (p. 486):

> "*Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.*" (Emphasis supplied)

We believe that this last quoted portion of this Court's opinion is especially applicable to the case here.

This Court further stated in its opinion there (p. 486):

> "We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure."

Can it be the law that the negligent failure of counsel for an accused criminal to follow a clear and simple state statute, resulting in his being *one day late* in perfecting his client's appeal to the State Supreme Court, constitutes an effective waiver of his client's right to raise the constitutional question of systematic exclusion of Negroes from juries because of race or color—as in *Brown v. Allen, supra*—and at the same time be the law that the failure of an accused's counsel to raise the constitutional question for reasons not shown, but which we must assume was done with the client's best interests in mind since there is no evidence in the record to the contrary, is not an effective waiver—as in the instant case? Can it be that a simple procedural oversight constitutes a waiver of a constitutional right, while the deliberate failure to file a motion raising the same constitutional question and to offer proof to sustain the contentions of such motion—which proof in the instant case could not have been made—is not a waiver? Is not the result in either case the same? We respectfully contend that these holdings are in conflict, and the decision of the Court of Appeals herein should yield.

Likewise, the decision of the Court of Appeals in the instant case is inconsistent with the principles in *Michel v. Louisiana, supra,* regarding waiver and effective counsel.

In the opinion of the Court of Appeals herein (App. A, p. 81) it is stated that it is essential in cases of this kind "that an attorney should advise with his client before waiving objections to a trial jury unconstitutionally and discriminatorily constituted," while the Courts have held that only competent counsel can intelligently determine whether such objections should be raised. See *Moore v. Michigan,* 1957, 355 U. S. 155.

The Court of Appeals discusses in its opinion the different roles which grand and petit juries play in our court system, and concludes (App. A, p. 83) that the objection as to the grand jury was effectively waived, but that the objection as to the petit jury was not. While we agree that the functions of these two bodies are different, we most respectfully submit that our research fails to reveal any authority holding that it is more difficult to waive an objection to a petit jury than it is to waive an objection to a grand jury. On the contrary, the reported cases which we have found appear to discuss the two types of juries on an equal basis insofar as the issue of waiver is concerned when there have been objections raised to both grand and petit juries in the same case. See *Carruthers v. Reed, supra.*

In the instant case, trial counsel, for reasons of their own, failed to raise the constitutional question. Perhaps they were aware of the fact that there were no Negroes qualified for service on the grand jury which indicted respondent and the petit jury which tried him, and, therefore, recognized that it was impossible for there to have been any unlawful exclusion of Negroes since there were none qualified for service to be excluded. Perhaps they were satisfied with the grand and petit jury panels and felt that it was to the best interest of their client not to raise the constitutional question and run the risk of having an unfavorable petit jury presented to them. But whatever their reason for failing to raise the question of exclusion of Negroes because of race or color, from the proof adduced it must be assumed that the decision was reached after due and careful consideration and with the respondent's best interests in mind. It is unreasonable to make any assumption to the contrary. For surely if it had been counsel's design and purpose, by so failing to make such objections, to aid the prosecution, they would not have defended the respondent with such unrelenting vigor and zeal as to have won them the praise of the Trial Judge, the District Attorney, the Mississippi Supreme Court and the United States District Judge for their efforts.

We respectfully submit that the Court of Appeals is in error in holding that the objection as to the petit jury was not effectively waived and, hence, that the judgment of conviction is unconstitutional, subject to collateral attack, and is void and of no effect.

IV

THE DECISION OF THE COURT OF APPEALS WILL OPERATE TO GRANT UNJUSTLY TO THE RESPONDENT AND TO ALL OTHER MEMBERS OF THE NEGRO RACE ABSOLUTE IMMUNITY TO PROSECUTION IN THE COURT IN WHICH THE RESPONDENT WAS TRIED.

The opinion of the Court of Appeals (App. A, pp. 83, 84) provides that the State of Mississippi shall re-try respondent, if at all, within a period of eight months from the time this Court acts upon this petition for writ of certiorari and provides further that:

> "Any such re-trial must of course be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate his constitutional rights."

Thus it appears that the Court of Appeals would require that the names of Negroes be placed in the jury box from which would be drawn the petit jury before whom the respondent would be tried, even if he should be tried upon the present indictment. This conclusion would seem naturally to follow from the decision of the Court of Appeals herein which holds that there has been a systematic exclusion of Negroes from the petit jury which tried the respondent, despite the fact that there is no proof whatsoever in the record that there were any Negroes qualified for jury duty when the respondent was tried.

As revealed by the record in this case, Carroll County, Mississippi, is one of the few counties in this State which has two Circuit Court Districts (or Judicial Districts) the County Site of the First Judicial District of that County being located at Carrollton and the Second Judicial District County Site being located at Vaiden. The respondent's trial was held at Vaiden, the crime of murder of which he was accused and convicted having been committed in the Second Judicial District of that County.

Section 1770, Mississippi Code of 1942, Recompiled, reads as follows:

> "In counties where there are two circuit court districts, the board of supervisors shall make a list of jurors for each district in the manner directed for a county, and the same shall be treated in all respects

as for an entire county. In such counties a juror shall not be required to serve out of his district, except the court in its discretion should otherwise direct, and except when drawn on a special venire; and in either of such excepted cases the jury shall be drawn from the two jury boxes, if the court so direct, one name from each alternately."

It is evident from the reading of said section that the two Circuit Court Districts (or Judicial Districts) of Carroll County operate for all practical purposes as if they were different counties insofar as the operation of the Circuit Court is concerned, except where the court shall, in its discretion, direct that jurors be drawn for regular or special venires from the district other than where the court is sitting. Hence, in our consideration of the effect of the new trial of the respondent under the terms of the Court's order herein, we need concern ourselves only with the qualified electors in the Second Judicial District of Carroll County. For we cannot presume that the Circuit Judge would exercise his discretion and direct that jurors be drawn from the First Judicial District of said County.

For the Court's further consideration, we submit Section 26 of the Mississippi Constitution of 1890, which provides in part that:

> "In all criminal prosecutions the accused shall have a right to . . . a speedy and public trial by an impartial jury of the county where the offense was committed . . ."

Also, Section 2508, Mississippi Code of 1942, Recompiled, states:

> "On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof

in vacation, supported by the affidavits of two or more creditable persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

While said Section 26 of the Mississippi Constitution and said Section 2508, Mississippi Code of 1942, Recompiled, have not been construed by the Supreme Court of Mississippi with regard to whether a trial court could under any circumstances grant, upon motion of the State, a change of venue to another county, it must be conceded that opposition to such a motion for change of venue could be vigorously urged on behalf of an accused.

As affirmative proof of the fact that neither were there at the time of respondent's trial in 1954 nor have there been since any Negroes qualified for jury service in the Second Judicial District of Carroll County, we filed with the Court of Appeals three duly executed affidavits of present and former public officials of Carroll County and a certified copy of an order of the Board of Supervisors of said County and annexed copies thereof as appendices to our petition for rehearing and supporting brief (R. 358-363).

The certified copy of the order of the Board of Supervisors of Carroll County (R. 360), duly recorded in Book "R" at page 136 of the Minutes of the Board of Supervisors of said County, reveals that said Board of Supervisors ordered a new registration in said County because of confusion in the registration books. Said Board order rendered ineffective any registration of electors prior to January 1, 1949, as of the effective date of the new registration books—July 1, 1949.

The affidavit of Claude Hatcher (R. 358, 359), who served as Circuit Clerk and Registrar of Carroll County, Mississippi, from January, 1940, to January, 1956, states that during his said tenure of office no persons in said Second Judicial District of said County, known or believed by him to be Negroes, either were registered or presented themselves to make application to register to vote, with the exception of Willie Burkhead, which instance is explained in detail under Proposition II hereof, and that from the time of the aforesaid new registration in 1949 until the expiration of his term of office there were no persons in said Second Judicial District, known or believed by him to be Negroes, who were qualified electors. Therefore, there could have been none who were qualified jurors at the time of respondent's trial in 1954.

The affidavit of G. W. Turbeville, Jr., (R. 361, 362) who immediately succeeded the said Claude Hatcher in office as Circuit Clerk and Registrar of said Carroll County and who continues to serve in that official position, states that no persons in the Second Judicial District of said County, known or believed by him to be Negroes, have either registered to vote or presented themselves to make application for registration, and that no names of any persons, known or believed by him to be Negroes in the Second Judicial District of said County, appear on the voter registration books in his office, and further states that an examination of the lists of poll taxpayers for the years 1949 to 1957, both inclusive, reveals the names of only two persons known or believed by him to be Negroes—Roy Robertson, who paid his poll tax for the year 1953, and Willie Burkhead, who paid his poll tax for the year 1949. Said affiant further noted that the list of persons who paid poll taxes for the year 1958 had not at that time been filed in his office.

The affidavit of H. R. Michie (R. 363), who, as Deputy Sheriff of Carroll County, is in charge of the Sheriff's office in the Second Judicial District of said County, states that the only person in said Second Judicial District, known or believed by him to be a Negro, who has paid his poll tax for the year 1958 is Willie Burkhead.

Furthermore, the aforesaid affidavits affirmatively show that no Negro has been intimidated or hindered in any way in order to prevent or discourage him from registering to vote or from paying his poll taxes.

The proof contained in said affidavits was not made at the hearing upon respondent's petition for writ of habeas corpus in the District Court for the reason that we were convinced at the time of said hearing—and still are convinced—that in the light of the established legal authorities on the subject, the respondent's proof fell far short of making out a prima facie case of systematic exclusion of Negroes from the grand and petit juries, that petitioner was not called upon to refute the grossly inadequate proof offered by respondent, that a waiver of respondent's right to object to the petit jury was established by the existing record, and that any additional proof on behalf of petitioner would have been surplusage and would have amounted to an unnecessary prolonging of the hearing and a needless encroachment upon the valuable time of Judge Clayton.

Although the record in this case reveals not even the slightest suggestion of any act of intimidation designed to prevent or preventing any member of the Negro race from becoming a qualified juror, the Court of Appeals would require the petitioner to prove that there has been no such intimidation. We respectfully submit that such a requirement in the instant case is wholly without legal precedent in any of the federal or state courts; in fact, the established law on the subject is to the contrary. We respectfully submit that no blame can be placed upon this State, its officers, or its people for the fact that no Negroes—for reasons known only to them—have presented themselves for registration to vote in said Second Judicial District of Carroll County and that no Negroes have paid sufficient poll taxes to be qualified electors therein and, thus, are not qualified jurors.

If all members of any race voluntarily refrain from seeking to become qualified for jury service over the years, as in the instant case, we know of no legal means by which they can be required to become so qualified, and we are sure that this Court would not suggest that Negroes be coerced against their will to become qualified jurors. Therefore, if the decision of the Court of Appeals, the review of which is hereby sought in this Court, is permitted to stand, the end result will be that the continued failure of Negroes in the Second Judicial District of Carroll County to present themselves for registration and to qualify as electors, and thus refrain from becoming qualified jurors, will render all Negroes immune to successful prosecution for any and all crimes which they might commit in said Second Judicial District.

CONCLUSION

For all of the foregoing reasons petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of
Mississippi

J. R. GRIFFIN
Assistant Attorney General

JOHN H. PRICE, JR.
Assistant Attorney General

BARNETT, JONES
& MONTGOMERY
Of Counsel

ROSS R. BARNETT
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Joe T. Patterson, one of the attorneys of record for the petitioner in the above cause, hereby certify that I have this day served the foregoing petition, together with the appendices thereto, by mailing three copies thereof, properly addressed, with United States Air Mail postage prepaid, to George N. Leighton, 123 West Madison Street, Chicago 2, Illinois, he being of counsel for the respondent.

This the day of June, 1959.

APPENDIX A.

Opinion of The Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17300

UNITED STATES OF AMERICA, ex rel., ROBERT LEE GOLDSBY,

Appellant,

versus

WILLIAM HARPOLE, Superintendent of the Mississippi State Penitentiary, Parchman, Mississippi,

Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(January 16, 1959.)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

RIVES, Circuit Judge:

On September 4, 1954, Bryant Nelms, a white man, and Mrs. Moselle McCorkle Nelms, his wife, were shot by one or more Negroes firing from an automobile after Nelms had ordered the Negroes to leave his gasoline filling station and dairy bar near Vaiden, Mississippi. Mrs. Nelms was killed. Later that same day, Robert Lee Goldsby and several other Negroes in an automobile with him were apprehended and lodged in jail. There was evidence to the effect that a .32 caliber bullet was removed from the body of Mrs. Nelms; that a pistol was obtained by the sheriff from appellant's possession when he was arrested; that the two were sent to the F. B. I. Laboratory in Washington, D.C.; and that there a ballistics examination identified the bullet as having been fired from appellant's pistol.

On his preliminary trial, the appellant was represented by Messrs. Tighe and Tighe, a law firm of Jackson, Mississippi. On November 8, 1954, a Grand Jury of the Second Judicial Circuit of Carroll County, Mississippi, indicted the appellant for the murder of Mrs. Nelms. By that time, an aunt who lived in Gary, Indiana, had employed George N. Leighton, Esquire, a Negro attorney of Chicago, Illinois, to defend the appellant. Mr. Leighton appeared with him on his arraignment, the same day that the indictment was returned. A plea of not guilty was entered. The attorney requested and the court granted time for the preparation of motions necessary to raise certain constitutional questions.

November 10th, allowing a lapse of two days, was set as the date of trial. Before that time the attorney had ready for filing a motion to quash the indictment on the ground that Negroes had been systematically excluded from the grand jury, a motion for change of venue, and a petition for removal of the case to the federal court.[1] Before they could be filed, however, appellant's brother and a different aunt had employed John W. Prewitt, Esquire, a white attorney of Vicksburg, Mississippi. Mr. Prewitt told these relatives of appellant that he could not work with the Negro attorney, Mr. Leighton. They informed Leighton of their employment of Prewitt and requested Leighton's withdrawal. Leighton promptly advised the District Attorney and thereafter the court that he was withdrawing from the case. The motions which he had prepared were never filed.

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[1] Under 28 U. S. C. A. §1443 and §§1446-1449.

The court then appointed Luther Ringgold, Esquire, a white attorney of Winona, Mississippi, to defend the appellant. Mr. Ringgold informed the court that relatives had employed Mr. Prewitt, and both Ringgold and Prewitt defended the appellant skillfully and ably, with the possible exception that they failed to raise the points that Negroes were systematically excluded from the grand jury and from the petit jury. The appellant was convicted and sentenced to death. On appeal to the Supreme Court of Mississippi, his conviction was affirmed.[2]

Attorneys Ringgold and Prewitt took no further action and have not since appeared in the case. Attorney Leighton re-entered the case and applied for a writ of certiorari to the Supreme Court of the United States, actually urging for the first time the systematic exclusion of Negroes from the grand jury and from the petit jury. Certiorari was denied by the Supreme Court of the United States.[3] The Supreme Court of Mississippi then fixed the date of appellant's execution for February 24, 1956.[4]

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[2] Goldsby v. State, Miss. 1955, 78 So.2d 762.

[3] Goldsby v. State of Mississippi, No. 279, 1955, 350 U.S. 925.

[4] Goldsby v. State, Miss. 1956, 84 So.2d 528.

Three days theretofore, on February 21, 1956, Mr. Leighton filed for the appellant in the Supreme Court of Mississippi[5] a petition for writ of error coram nobis, or, in the alternative, habeas corpus, asserting for the first time in the State courts the systematic exclusion of Negroes from the jury lists. The Supreme Court of Mississippi held that the denial of certiorari by the United States Supreme Court was res judicata of the question,[6] and that the application came too late since no objection to the validity of the juries had been made at the time of trial.[7]

Attorney Leighton again petitioned for certiorari to the Supreme Court of the United States. The Clerk of the Supreme Court requested the Attorney General of Mississippi to file a response, stating, "The response should discuss particularly the issues of systematic exclusion of negroes from the grand and petit jury panel and the state procedure for raising this question in a post conviction proceeding." Such a response was of course filed. The Supreme Court denied certiorari.[8] The Supreme Court of Mississippi again set a date for execution, this time for February 12, 1957.[9]

On January 29, 1957, Attorney Leighton filed for the appellant a petition for writ of habeas corpus in the

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[5] Pursuant to Chapter 250 of the Laws of Mississippi of 1952, Section 1992.5, Code of 1942, Recompiled.

[6] In that respect, certainly the holding was erroneous. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." United States v. Carver, 1923, 260 U.S. 482, 490. See also, Darr v. Burford, 1949, 339 U.S. 202, 226-228, dissenting opinion of Mr. Justice Frankfurter.

[7] Goldsby v. State, Miss. 1956, 86 So.2d 27.

[8] Goldsby v. State, No. 185, 1956, 352 U.S. 944.

[9] Goldsby v. State, Miss. 1957, 91 So.2d 750.

United States District Court for the Northern District of Mississippi, Greenville Division. Honorable Allen Cox, United States District Judge, after hearing argument but without waiting for an answer, denied the petition on the same day that it was filed and also denied a certificate of probable cause.

On February 8, 1957, a motion for stay of execution was denied by Honorable Wayne G. Borah, a Judge of this Court. On February 11, 1957, the Honorable Earl Warren, Chief Justice of the United States, granted a stay of execution "until petitioner has had an opportunity to exhaust his federal rights in this proceeding." This Court thereafter heard the appeal from the decision of Judge Cox and reversed and remanded the cause for a hearing of the evidence.[10]

Upon remand the case was heard at a special session of the court before Honorable Claude F. Clayton, United States District Judge. *At the conclusion of the evidence* and after hearing argument, Judge Clayton denied the petition, expressing his views in an oral opinion as follows:

"Mr. Court Reporter, take this:

> "The issues of fact, as I understand them in this proceeding, are very much as I stated at the beginning of this hearing. For the benefit of counsel in any further proceeding that may arise, I will state my findings of fact and conclusions of law separately.
>
> "First: The proof shows, as I indicated to counsel for petitioner before he made his argu-

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[10] United States ex rel. Goldsby v. Harpole, 5th Cir. 1957, 249 F.2d 417.

ment, that the grand jury which returned the indictment against this petitioner had no Negroes on it.

"Second: The proof shows that the petit jury which tried the petitioner had no Negroes on it.

"Third. The proof fails to meet the burden, as I understand it, of showing a 'systematic and willful' exclusion of any member of the Negro race from jury service in that county.

"Fourth: As a matter of fact, it is rather difficult for the Court to distinguish between fact and law in the twilight zone that arises between the two, but as a matter of fact the Court finds that the petitioner has, and had, at the time of his indictment and trial a high school education, and finds as a fact that he was twenty-eight years old at the time; and finds as a fact that he was represented at the preliminary aspect of the matter by counsel, who were chosen for him by some means not shown by testimony in this record—they being the firm of Tighe & Tighe of Jackson, Mississippi; next, that he was represented by counsel, as the record shows, of his family's selection, Mr. Leighton, at his arraignment; that he was represented by able and competent counsel of his family's selection and employment throughout the trial and in the Supreme Court of Mississippi on appeal, and that in addition he was represented by able counsel appointed by the Circuit Court of Carroll County.

"With these factual findings, the Court could not do otherwise than conclude, as a matter of law, that ample opportunity was afforded this petitioner to raise in the courts of the State of Mississippi, the constitutional question involved in this hearing, and undoubtedly if the question of the absence of Negroes from the grand jury and the absence of Negroes from the petit jury had been presented in the Circuit Court of Carroll County by a proper motion to quash, such a motion would have been sustained. That is borne out by the case I cited to counsel, Farrow v. State, 91 Mississippi 509, 45 Southern 619, decided in 1908.

"The opportunity was there, the decision was made by competent counsel of the family's employment and of the Court's appointment not to raise that question and not to invoke that issue in the lawsuit.

"Under these circumstances, the Court is of the opinion that the petitioner understandingly, in connection with his counsel, waived whatever right he may have had to present any question with respect to the composition of the jury, and that he, therefore, is barred from raising the question here or prevailing on that question being raised in this Court.

"The Court is further of the opinion that the motion for taking of depositions in Chicago is not only untimely, having been filed too late, but from statement of counsel as to the purpose of taking the testimony of those witnesses, in the light of the Court's findings that I have given you, the testimony would not be of any help here."

Judge Clayton refused to issue a certificate of probable cause, and the Supreme Court of Mississippi again set a date for execution, this time for May 29, 1958.[11] On May 27, 1958, the Chief Justice of the United States again granted a stay of execution "until the petitioner has had an opportunity to exhaust his federal rights in this habeas corpus proceeding." Upon consideration, we now grant a certificate of probable cause.[12]

The present appeal is from Judge Clayton's decision and presents the questions of whether Negroes were systematically excluded from the grand jury and from the petit jury, and whether those objections were waived as to both the grand jury and the petit jury, when not taken on the trial. In so far as it pertains to those issues, the documentary evidence and the testimony of each of the witnesses are summarized at some length in an appendix to this opinion.

I.

Were Negroes Systematically Excluded from the Grand Jury and the Petit Jury or from Either.

No question is or can be raised as to the validity of the constitutional principle here involved. In *Norris v. Alabama,* 1935, 294 U.S. 587, 589, Chief Justice Hughes, speaking for a unanimous Court, expressed it as follows:

> ". . . . Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter v. Texas,* 177 U.S. 442, 447, in relation to exclusion from service on grand juries: 'Whenever by any action of a State, whether

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[11] Goldsby v. State, Miss. 1958, 102 So.2d 215.

[12] See 28 U.S.C.A. §2253.

> through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia,* 100 U.S. 303; *Neal v. Delaware,* 103 U.S. 370, 397; *Gibson v. Mississippi,* 162 U.S. 565.' This statement was repeated in the same terms in *Rogers v. Alabama,* 192 U.S. 226, 231, and again in *Martin v. Texas,* 200 U.S. 316, 319. The principle is equally applicable to a similar exclusion of negroes from service on petit juries. *Strauder v. West Virginia, supra; Martin v. Texas, supra.''*

Many of the pertinent Supreme Court cases are collected in annotations in 94 L.ed. 856 and 97 L.ed. 1249. The later cases have been no less positive in sustaining the principle.[13]

The right is protected also by statute. 18 U.S.C.A. §243 reads as follows:

> ''Exclusion of jurors on account of race of color:
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> ''No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in in any court of the United States, or of any State on account of race, color, or previous con-

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[13] *See, e.g.,* Hernandez v. Texas, 1954, 347 U.S. 475; Reece v. Georgia, 1955, 350 U.S. 85; Eubanks v. Louisiana, 1958, 356 U.S. 584.

> dition or servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

Addressing itself particularly to the manner of selection of juries from lists of qualified electors prevailing in Mississippi,[14] a unanimous Supreme Court declared in *Patton v. Mississippi*, 1947, 332 U.S. 463, 469:

> ". . . . When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

In *Eubanks v. Louisiana*, 1958, 356 U.S. 584, 587, again by a unanimous Court, the foregoing statement from the *Patton* case, *supra*, was quoted with approval, to which the Court added:

> ". . . . This is essentially the situation here. True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors. But as Chief Justice Hughes said for the Court in *Norris v. Alabama*, 294 U.S. 587, 598, 'If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be

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[14] See Title 10, Chapter 9, Sections 1762-1802, Vol. 2, Mississippi Code 1942 Ann.

> accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause] — adopted with special reference to their protection—would be but a vain and illusory requirement.' Compare *Reece v. Georgia,* 350 U.S. 85, 88[illegible]*ernandez v. Texas,* 347 U.S. 475, 481."

It can no longer be doubted that proof of long-continued exclusion of Negroes from jury service makes a "strong prima facie case." *Norris v. Alabama, supra,* 294 U.S. at p. 598.[18] In *Hernandez v. Texas,* 1954, 347 U.S. 475, 480, the holding was that persons of Mexican descent were systematically excluded from jury service. As to the proof necessary to sustain the charge of discrimination, the Court said:

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris v. Alabama,* 294 U.S. 587. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion,' has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class."

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[18] See also, Patton v. Mississippi, 1947, 332 U.S. 463, 468; Reece v. Georgia, 1955, 350 U.S. 85, 88.

In the present case, the naked figures prove startling enough. According to the 1950 United States Census, Carroll County, Mississippi, had a population of 15,448 persons, of which 8,836 or more than fifty-seven per cent were nonwhite, predominantly Negroes.[16] Of the nonwhite population, 1,949 were males twenty-one years of age and over.[17] The median school years completed by the nonwhite population of Carroll County, twenty-five years of age and over, were 5.2 years. Yet none of the officials called as witnesses—the Circuit Clerk, the Chancery Clerk, the Sheriff, the ex-Sheriff who had served for twenty years, the District Attorney, or the Circuit Judge—could remember any instance of a Negro having been on a jury list of any kind in Carroll County.[18]

We cannot assume that Negroes, the majority class in Carroll County, had en masse, or in any substantial numbers, voluntarily abstained from registering as electors[18a] and, by such action, had rendered themselves ineligible for jury duty. If the registration officials freely and fairly registerd qualified Negroes as electors, that fact rested more in the knowledge of the State. The burden was on appellee, as the State's representative, to refute the strong prima facie case developed by the appellant.[19] The only Negroes ever proved registered as electors in Carroll County were two who had died before 1954.

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[16] Of the male nonwhite population, 4,412 were Negroes, 4 were of other races. Of the female nonwhite population, 4,417 were Negroes, 3 were of other races.

[17] Only males twenty-one years of age and over could be competent jurors in Mississippi. Section 1762, Vol. 2, Mississippi Code 1942 Ann.

[18] That is true even if full weight be given to the testimony of several of the officials to the effect that they were unable accurately to distinguish between whites and Negroes. That testimony tends to negative the sharp distinction between whites and Negroes habitually drawn in nearly all parts of the South. We would expect that distinction to be no less definite in Mississippi in the light of the decision of the Mississippi Supreme Court to the effect that ". . . descendants of Africans are classed as members of the colored race, regardless of the admixture, as long as there is an appreciable amount of negro blood found." Moreau v. Grandich, Miss. 1917, 75 So. 434, 435.

[18a] As has been said, in Mississippi, to be eligible for jury duty one must be a qualified elector. See Footnote 14, *supra*.

We have called the figures startling, but we do not feign surprise because we have long known that there are counties not only in Mississippi, but in the writer's own home State of Alabama,[20] in which Negroes constitute the majority of the residents but take no part in government either as voters or as jurors. Familiarity with such a condition thus prevents shock, but it all the more increases our concern over its existence.[21] When, in a proper case such as this, there is added to our common knowledge proof that some of the Negro citizens are qualified educationally and by other legal standards but are excluded from serving as jurors solely because of their race or color, the courts must declare the maintenance of such a condition violative of the Constitution and must not tolerate its longer continued existence.

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[19] Patton v. Mississippi, and Reece v. Georgia, supra, n. 15.

[20] Compare Davis v. Schnell, S.D. Ala. 1949, 81 F.Supp. 872, 879, aff'd as Schnell v. Davis, 1949, No. 606, 336 U.S. 933, and the public debates which preceded the adoption of the "Boswell Amendment" there declared unconstitutional.

[21] Situations like that were disturbing at a much earlier period of our Country's life. In 1832, more than a century and a quarter ago, de Tocqueville wrote:

> "I said one day to an inhabitant of Pennsylvania: 'Be so good as to explain to me how it happens that in a state founded by Quakers, and celebrated for its toleration, free blacks are not allowed to exercise civil rights. They pay taxes; is it not fair that they should vote?'
>
> " 'You insult us,' replied my informant, 'if you imagine that our legislators could have committed so gross an act of injustice and intolerance.'
>
> " 'Then the blacks possess the right of voting in this country?'
>
> " 'Without a doubt.'
>
> " 'How come it, then, that at the polling-booth this morning I did not perceive a single Negro?'

In our opinion, the appellant proved a strong prima facie case that Negroes were systematically excluded from the grand jury and from the petit jury, and that case was not refuted by the State.

II.

Were Objections to Systematic Exclusion of Negroes Effectively Waived?

The more serious questions are whether objections to the systematic exclusion of Negroes from the grand jury

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" 'That is not the fault of the law The Negroes have an undisputed right of voting, but they voluntarily abstain from making their appearance.'

" 'A very pretty piece of modesty on their part!' rejoined I.

" 'Why, the truth is that they are not disinclined to vote, but they are afraid of being maltreated; in this country the law is sometimes unable to maintain its authority without the support of the majority. But in this case the majority entertains very strong prejudices against the blacks, and the magistrates are unable to protect them in the exercise of their legal rights.'

" 'Then the majority claims the right not only of making the laws, but of breaking the laws it has made?' "

Democracy in America by Alexis de Tocqueville, Vol. 1. Chapter 15, page 261, quoted by Professor Roland M. Harper of the University of Alabama in his letter to the Editor of the Montgomery Advertiser published December 17, 1958.

and to a like exclusion from the petit jury were waived when they were not made at the trial.

In deciding those questions, we should understand exactly the nature of the right under consideration. Usually the discrimination has been condemned as a denial of the equal protection of the laws. It has been indicated, however, that under certain circumstances it may constitute also a denial of due process of law.[22]

The denial of the equal protection of the laws is especially marked when the defendant is a Negro and the victim is a white person: that is when the right is viewed narrowly and strictly from the viewpoint of the accused. Looking at it more broadly from the interest of the public in the administration of justice, systematic exclusion of Negroes from juries can result in inadequate protection of law-abiding Negroes against the criminal elements of their own race. The necessity for protection may not be brought close enough home to white jurors to prevent them from being too lenient with Negroes who commit crimes against other Negroes. The Constitution provides to law-abiding Negroes also the safeguard that members of their race shall not be systematically excluded from juries. The denial of the equal protection of the laws extends also to civil cases in which the lists of jurors are drawn from a jury box from which the names of Negroes have been systematically excluded. Thus, the right is one of broad significance closely and vitally connected with the proper administration of justice in both civil and criminal cases.

Mr. Justice Jackson dissenting in *Cassell v. Texas*, 1950, 339 U.S. 282, 301, commented that,

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[22] *See* Fay v. New York, 1947, 332 U.S. 261, 284, n. 27; Akins v. Texas, 1945, 325 U.S. 398, 403.

> ". . . in the earlier cases where convictions were set aside, the discrimination condemned was present in selecting *both grand and trial jury* and, while the argument was chiefly based on the latter, the language of the opinions made no differentiation, nor for their purpose did they need to. *Cf. Strauder v. West Virginia,* 100 U.S. 303; *Neal v. Delaware,* 103 U.S. 370; see also *Bush v. Kentucky,* 107 U.S. 110; *Gibson v. Mississippi,* 162 U.S. 565; *Hale v. Kentucky,* 303 U.S. 613.'"[23]

Continuing, Mr. Justice Jackson said:

> "It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not.
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> "The grand jury is a very different institution. The States are not required to use it at all. *Hurtado v. California.* 110 U.S. 516. Its

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[23] In addition to the cases cited by Mr. Justice Jackson, see those collected and separated as to the type of jury involved in annotations in 94 L.ed. 856 and 97 L.ed. 1249.

> power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of the trial jury and the function of the grand jury is all the difference between deciding a case and merely deciding that a case should be tried."

Cassell v. Texas, supra, 339 U.S. at pp. 301, 302.

Mr. Justice Jackson's dissenting opinion is, of course, entitled to no weight as a precedent. We think, however, that the quoted reasoning is sound. Further, the Supreme Court of Georgia, in language not less forceful, has also pointed out how much more important to an accused is the right to a fair and nondiscriminatory jury in the case of a trial jury than in that of a grand jury. *Hall v. State,* Ga.App. 1909, 66 S.E. 390, 392. It may be significant that in *Michel v. Louisiana,* 1955, 350 U.S. 91, attention was called three times (350 U.S. at 93, 96, and 99) to the fact that there no attack was made on the composition of the petit jury.

Usually it is clear, and in the present case especially so, that, regardless of its composition, any grand jury would insist that the accused be brought to trial. When it comes to the actual trial, however, the decision of whether to submit to trial before a jury in the selection of which the defendant's race has been systematically excluded presents a problem fraught with far more serious consequences. The apprehended existence of prejudice was one inducement which led to the adoption of the Fourteenth Amendment.[24] Systematic exclusion of members of a defendant's race from a trial jury would, we think, be violative both of the equal protection clause and of the due process clause of the Fourteenth Amendment.

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[24] ". . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

"In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" Strauder v. West Virginia, 1879, 100 U.S. 303, 309.

Such positive discrimination is more serious and damaging than the mere negative absence of one of the twelve jurors considered in *Patton v. United States*, 1930, 281 U.S. 276. In that case, the Supreme Court said:

> ". . . . Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." (281 U.S. at pp. 312, 313.)

The United States Constitution does not guarantee to a defendant in a State court a trial before a jury in which his race is proportionately represented, nor a trial before a jury composed in any part of members of his race,[45] nor even to a jury trial at all, if other defendants are not accorded a jury trial.[**] It does assure him of equal treatment under the law and that, so long as the State elects to accord jury trials, it must not systematically exclude from jury service qualified persons of his race. "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Cassell v. Texas, supra,* 339 U.S. at 287.

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[45] Virginia v. Rives, 1879, 100 U.S. 313, 322-323; Neals v. Delaware, 1880, 103 U.S. 370, 394; Martin v. Texas, 1906, 200 U.S. 316, 321; Cassell v. Texas, 1950, 339 U.S. 282, 287.

The fact that the prohibition is aimed at a system often makes it practically inadvisable for a defendant in a particular case to raise the issue. If Negroes were placed upon the list or venire, their names might easily be stricken before the particular jury was selected and impaneled. To a single defendant, then, the principle involved is often of doubtful or no value and he may forego seeking its protection, though it cannot be denied that from a broader, overall consideration, the long-continued, systematic and arbitrary exclusion of qualified Negro citizens from service on juries solely because of their race or color deprives every Negro of the equal protection of the law.

Moreover, the very prejudice which causes the dominant race to exclude members of what it may assume to be an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. Conscientious southern lawyers often reason that the prejudicial effects on their client of raising the issue far outweigh any practical protection in the particular case. Many entertain the view expressed by Mr. Justice Jackson concurring in the result in *Shepherd v. Florida*, 1951, 341 U.S. 50, 55:

[**] Maxwell v. Dow, 1900, 176 U.S. 581; Snyder v. Massachusetts, 1934, 291 U.S. 97, 105.

> "... I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought. To me, the technical question of discrimination in the jury selection has only theoretical importance."

Such courageous and unselfish lawyers as find it essential for their clients' protection to fight against the systematic exclusion of Negroes from juries sometimes do so at the risk of personal sacrifice which may extend to loss of practice and social ostracism.

As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions, rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries. The Supreme Court of Mississippi has said that, "We have the right to make use of knowledge of the popular and general customs of the people of this State, and public conditions therein." *Moore v. Grillis*, 1949, 39 So.2d 505, 508. A like authority and duty is vested in this Court.[27]

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[27] City of Hughes Springs, Tex. v. Lips, 5th Cir. 1941, 118 F.2d 238; Rogers v. Douglas Tobacco Board of Trade, 5th Cir. 1957, 244 F.2d 471, 478; Mays v. Burgess, D.C. Cir. 1945, 147 F.2d 869, 873; 20 Am.Jur., Evidence, Sec. 108.

The evidence in this case (see appendix) fairly considered shows no waiver by the appellant himself but at most by his counsel without his express authority. In ordinary procedural matters, the defendant in a criminal case is bound by the acts or nonaction of his counsel.[38] That might extend to the waiver of the objection that Negroes were systematically excluded from the grand jury. In noncapital cases, it might extend to a like waiver as to the petit jury. It might extend to such a waiver even in capital cases, where the record affirmatively shows that the particular jury was desired by defendant's counsel after conscientious consideration of that course of action which would be best for the client's cause."

In this case, neither of the petitioner's trial attorneys has appeared or has been called to testify to any reason for waiving his client's constitutional right to a legally constituted trial jury, and no good reason appears otherwise from the record. The very heinousness of the crime and the weight of the physical evidence"[40] made it all the more necessary that the defendant's constitutional rights be not lightly or unadvisedly surrendered. The State trial judge testified that, "had such a motion been made and proved, that would have been sustained." As Judge Clayton commented, that is borne out by the case of *Farrow v. State*, 1908, 91 Miss. 509, 45 So. 619. However strong might be the evidence of guilt, there was a possibility that a nondiscriminatory jury might not impose capital punishment. That chance was waived by defendant's counsel, so the District Court held.

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[38] See Floyd v. United States, 5th Cir., No. 17236, decided November 5, 1958, and cases there cited; Mitchell v. United States, D.C. Cir., No. 14198, decided June 12, 1958, m/s.

[39] See Williams v. Georgia, 1955, 349 U.S. 375, 377, 378, 379; same case, 211 Ga. 763, 88 S.E. 2d 376; Carruthers v. Reed, 8th Cir. 1939, 102 F.2d 933, 938; United States v. Brady, 4th Cir. 1943, 133 F.2d 476, 481.

[40] See the first paragraph of this opinion.

If for any reason beyond the defendant's control, upon his trial for murder, the defendant did not have the effective representation of counsel at the time of a purported waiver by such counsel without consulting the client of the right to be tried before a legally constituted jury, such waiver can be given no effect.[31]

Even in handling civil litigation, there are limitations upon the implied authority of an attorney to make decisions for his client.[32] Few, if any, would argue that, without consulting his client, an attorney has implied authority to submit his cause to arbitration, or to any but a legally constituted tribunal. When not merely the client's property but his life is at stake, it is all the more essential that an attorney should advise with his client before waiving objections to a trial jury unconstitutionally and discriminatorily constituted.

The Negro lawyer was ready and willing to raise the issue of systematic exclusion of Negroes from the juries. The white lawyer, who was retained, refused to join with the Negro lawyer in the defense of appellant. When, upon request of the appellant's relatives, the Negro lawyer had left the case, the white lawyers failed to raise the issue. When the white lawyers had finished with the trial of the case, that issue was left as the only one that could save the appellant's life. The Negro lawyer then took over and raised the issue.

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[31] See Bovey v. Grandsinger, 8th Cir. 1958, 253 F.2d 917, 922; 53 Michigan Law Review (1954-55). Recent Decisions, pp. 885-887, commenting on Harvey v. United States, D.C. Cir. 1954, 215 F.2d 330, and Judge Danaher's dissent in that case: compare Mitchell vs. United States, supra Note 28.

[32] 5 Am.Jur., Attorneys at Law, Sec. 92; 7 C.J.S., Attorneys, Sec. 100, pp. 919, 922.

In *Johnson v. Zerbst*, 1938, 304 U.S. 458, 464, the Supreme Court declared:

> "... It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[33]

The conditions giving rise to serious doubt as to whether the failure to make the objection at the trial constituted a voluntary and intelligent waiver of appellant's constitutional rights are all matters for which the State of Mississippi must bear responsibility. It is in a poor position to insist upon waiver.[34] Upon this record, we hold that the appellant's constitutional right to be tried before a petit jury from which Negroes have not been systematically excluded has not been effectively waived by counsel authorized to make such waiver.

We have considered remanding this cause again for the development of a more full and adequate record. No record was developed originally, and our previous decision (249 F. 2d 417) remanded the case so that the evidence might be heard and considered. The appellant has been confined to jail or in the penitentiary for more than four years, and has not yet been tried before a legally constituted petit jury, nor has his right to such a trial been effectively waived. Inevitably, more months must elapse before he can be tried in conformity with the Constitution. We have concluded that to remand the case again for development of the record is not consistent with the promptness of disposition so essential in habeas corpus proceedings, nor with the right of the appellant to a speedy as well as a fair trial.

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[33] See also, Emspak v. United States, 1955, 349 U.S. 190. 198, and cases there cited.

[34] Compare Pollock v. Williams, 1944, 322 U.S. 4, 16; Moser v. United States, 1951, 341 U.S. 41, 47.

Upon the present record, therefore, we make definitive holdings as follows: that Negroes were systematically excluded both from the grand jury which indicted the appellant and from the petit jury which convicted him; that the objection as to the petit jury was not effectively waived and, hence, that the judgment of conviction is unconstitutional, subject to collateral attack, and is declared to be void and of no effect; that the objection as to the grand jury was waived, and the appellant is now legally detained upon his indictment for murder, but that he is entitled to be tried within a reasonable time; that this Court retains jurisdiction for the entry of such further orders and judgments as may be necessary or proper.[35]

The Court expresses its present opinion that a period of eight months from and after the entry of this judgment or its final test by certiorari or otherwise will be sufficient to afford the State of Mississippi an opportunity to take the necessary steps to re-try the appellant, either upon the present indictment or upon a subsequent legal presentment for the same offense, as the State may elect. If the appellant has not been re-tried within such period, this Court will consider and decide whether or not he should be discharged upon this petition for habeas corpus.

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[35] See Dowd v. Cook, 1951, 340 U.S. 206, 210; Mahler v. Eby, 1924, 264 U.S. 32, 46; U.S. ex rel. Sheffield v. Waller, W.D. La. 1954, 126 F.Supp. 537, 546, certificate of probable cause denied, 5th Cir. 1955, 224 F.2d 280; 28 U.S.C.A. §2106; 28 U.S.C.A. §2243, last sentence and footnotes 479 and 480.

Any such re-trial must of course be before a jury from which Negroes have not been systematically excluded, or before some court or tribunal so constituted as not to violate his constitutional rights. For the guidance of the parties, the Court expresses the further present opinion that if the appellant is re-tried, and if any question should arise as to the legality or constitutionality of such trial, that should be decided not upon the present petition but in the regular course by the Courts of the State of Mississippi, subject to possible review by the Supreme Court of the United States.

The judgment of the District Court is reversed and judgment here rendered in accordance with the holdings of this opinion.

Reversed and Rendered.

Appendix

Summary of Extracts from Evidence in District Court on Issues of Systematic Exclusion of Negroes from Grand Jury and Petit Jury and on Whether Such Objections Were Waived.

CLAUDE HATCHER,

called as a witness by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q. Calling your attention to November, '54, what was your occupation?

A. I was Circuit Clerk of Carroll County.

Q. In that capacity, Mr. Hatcher, did you have anything to do with the preparation of the summoning to serve on the grand jury and petit jury of the citizens of Carroll County?

A. I did.

. . . .

Q. Mr. Hatcher, when you prepared the jury summons for the grand and petit jury panels in Carroll County for the November Term in 1954, did you summon any members of the Negro race to serve on either or both panels?

A. I didn't summon any of them.

A. I issued the notices for the names of the jurors as given me by the judge of the court as drawn out of the jury box, which is our way of selecting a jury . . .

. . . .

Q. From your knowledge of the persons summoned, and from the official position you occupied in the issuance of processes for jury service, for both grand and petit juries, during the time you were clerk in Carroll County from 1940 to 1954, did you have occasion, and do you have any recollection of seeing any members of the Negro race on those panels?

A. No.

CROSS EXAMINATION

BY. MR. PATTERSON:

Q. During that time that you were Circuit Clerk of your county, Mr. Hatcher, do you recall, or did you, as Circuit Clerk, or any other county public official, ever see any officials of Carroll County systematically, deliberately, and intentionally exclude members of the Negro race of your county from becoming qualified electors or from serving on a jury in your county?

A. Not at all.

M. M. BENNETT,

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

A. . . . . I am Chancery Clerk of Carroll County, Mississippi, at Carrollton.

. . . .

A. Since January of 1944.

. . . .

Q. Mr. Bennett, during this period in which you served in an official capacity you told us about, and from the personal knowledge and information that you have obtained, does the list which you certified to the Clerk of the Circuit Court contain those persons eligible for jury service during this period you told us about, does that list contain, from your knowledge, any persons who are Negroes?

A. None that I know of.

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Mr. Bennett, during the time that you have been Chancery Clerk, and as such, the Clerk of the Board of Supervisors of your county, and of course, with the Board at the time they are taking the names for jury duty, do you know of any act on the part of any member of the

Board of Supervisors in selecting these names for jury service, do you know of any instance where any member of the Board of Supervisors of Carroll County has deliberately and willfully sought to find and exclude the names of Negroes in Carroll County from jury duty?

A. No, sir, I do not.

REDIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

Q. Now during that time, the same period of time, do you have an independent recollection of ever having registered in that district while you were a Deputy Circuit Clerk, any member of the Negro race as a registered voter?

A. I have.

Q. Well, could you tell us when it was?

A. Sometime in '44 or '45, or maybe '46 or '47, somewhere along in there.

Q. Can you recall who that person was?

A. Well, I've listed several of them I can't recall just who they all are, but I can recall several of them. Mose Hemmingway, for one, and Wes Jones was another.

Q. In what district was that?

A. District four.

Q. And they still live there?

A. No, they are dead. Both of them.

. . . .

Q. Do you think both of them died before 1954, if you know?

A. I think so.

H. E. ASHMORE,

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

Q. Mr. Ashmore, I call to your attention the date of November of '54, were you Sheriff of Carroll County at that time?

A. Yes, sir.

Q. How long had you been Sheriff in 1954?

A. About two years.

Q. When did your term of office expire?

A. In 1956.

Q. During that period of time, Mr. Ashmore, did your duties as Sheriff include the service of processes on citizens in Carroll County called for grand and petit jury service?

A. Yes.

Q. Did you, during the time you were Sheriff, if you can recall, serve any processes or summons issued by the Clerk of the Circuit Court of Carroll County for jury service, either grand or petit jury, to any person of the Negro race?

A. Well, now that's a little difficult question. I wouldn't say that a man probably had Negro blood in him, because we have summoned dark complected people and white complected people, so I wouldn't say whether a man was or was not a negro.

Q. You couldn't tell?

A. I couldn't tell whether he was a full blooded white man or not.

Q. Well, I was asking you a question, has any person indicated to you that they were members of the Negro race whom you have served any processes on?

A. I don't recall any being served on a real black Negro.

. . . . .

Q. Mr. Ashmore, during the time that you were Sheriff of Carroll County, did your duties include the collecting of taxes?

A. Yes.

Q. And you collected taxes from all the taxpayers in Carroll County?

A. Yes.

Q. Do you have any recollection of having collected taxes from persons of the Negro race?

A. We collect taxes from Negroes and Whites, too.

CROSS EXAMINATION

BY MR. PATTERSON:

. . . .

Q. Do you ever recall any instance of the summoning of jurors wherein members of the Negro race were systematically, willfully and deliberately excluded from being summoned as jurors?

A. No, sir.

GEORGE W. TURBEVILLE, JR.,

a witness called by petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

A. . . . I live in Vaiden, Mississippi, and am Chancery Court Clerk of Carroll County, Mississippi.

. . . .

A. Since the first of 1956.

. . . .

Q. And you received a subpoena duces tecum for this hearing, did you not?

A. That's right.

Q. And that subpoena asked for the jury list for the years 1952, '53, '54, '55, '56, and '57, did it not?

A. That's right.

. . . .

Q. Mr. Turbeville, from your knowledge acquired while Circut Clerk of Carroll County, do you know if this list includes any members of the Negro race?

A. I do not.

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Do you know that it does not include any members of the Negro race?

A. I do not.

J. T. ALLEN,

a witness called by the petitioner:

DIRECT EXAMINATION

. . . .

A. I am Sheriff of Carroll County.

Q. How long have you been Sheriff of Carroll County, sir?

A. Well, this time I'm in the third year.

Q. I take it that you had served as Sheriff of Carroll County prior to this time, sir?

A. I have.

Q. When was that, sir?

A. Well, at various times in the 30 years I have been connected with the Sheriff's office, for better than 20 years of that 30.

Q. Well, during that period that you have served as Sheriff, and prior to the last day of November, 1954, Mr. Allen, have you ever issued any processes or summons or notice to a member of the Negro race for jury service?

A. Well, I don't know exactly whether I have or not.

Q. And why would that be, sir?

A. Well, because I don't know whether they had Negro blood in them or not.

. . . .

Q. Now Mr. Allen, let me ask you this, if during the time that you served as Sheriff, prior to 1954 up to the last day of November, 1954, do you have an independent recollection of ever having served a process or notice or summons for jury duty to any citizen of Carroll County that you knew was a member of the Negro race?

A. Well, no, not that I know of.

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Mr. Allen, I believe you have been Sheriff of your county some five times, isn't that correct?

A. Well, somewhere along there.

. . . .

Q. Mr. Allen, during that period of time, a period of 20 years that you have served as Sheriff of Carroll County, or as a deputy sheriff of your county, do you recall any instance or occasion where members of the Negro race of your county were systematically, deliberately, and willfully excluded from being called to jury duty in your county?

A. No, sir.

JOHN E. ALDRIDGE,

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

A. John E. Aldridge, Winona, Mississippi, and I am District Attorney for the Fifth Judicial District of Mississippi.

. . . .

A. Since November 12, 1950.

Q. Your duties, Mr. Aldridge, include the handling of trials before juries, do they not?

A. They do, presenting the State's case.

Q. And you, during that time, presented the cases to the grand jury?

A. I did.

Q. Mr. Aldridge, during the time that you were a district attorney, and prior to the November Term of 1954 Circuit Court, and including the November Term of 1954, did you ever present a case to the grand jury of Carroll County, Mississippi, in which there was a member of the Negro race, who was known to be a Negro?

A. I couldn't say. There are certain counties in the district that I am not personally acquainted with nearly all of the men.

Q. I had reference, sir, in my question to those juries that you presented cases to, and in the instances when you had occasion to observe the composition of the grand jury, could you tell us whether or not at any time during the years in which you served as district attorney, when you presented a case or cases to the grand jury, did you ever present a case to the grand jury that included a person you knew to be a Negro?

A. I wouldn't know.

* * * *

Q. Mr. Aldridge, calling your attention to the judicial district in which you served, and that portion of the judicial district, including the Second District of Carroll County, Mississippi, including the town of Vaiden, Mississippi, have you at any time during the time that you served as District Attorney, presented a case to a petit jury of that particular district on which there was serving a member of the jury known to be a member of the Negro race?

A. I wouldn't know. I don't know what race the jurors belonged to.

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Under our procedure, Mr. District Attorney, does the district attorney have anything at all to do with the summoning of jurors and who they might be?

A. Not a thing in the world.

FRANK I. LOVELL, JR.,

being called as a witness by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

A. . . . I am Superintendent of Education in Carroll County.

. . . .

A. Since January of 1952.

Q. Now between the time you first began the duties of superintendent of public education of Carroll County, Mississippi, and the year 1954, particularly the last day of November, 1954, did your duties include supervision of the schools of members of the Negro race in Carroll County?

A. Yes, sir.

Q. And from your knowledge, does Carroll County have a system of education for Negroes, including high schools?

A. Yes, sir.

. . . .

Q. Did you have any members of the Negro race who attended the high schools of Carroll County under your supervision, prior to 1954?

A. Yes.

Q. And during the period 1952 to 1954, were members of the Negro race graduated from the high schools of Carroll County, Mississippi?

A. Yes.

. . . .

Q. Do you have an independent knowledge, sir, of how many Negroes graduated from the high schools of Carroll County in 1954 while you were supervising those schools?

A. Without my records I couldn't tell you, no, sir.

Q. But you would say there were such graduates?

A. Oh, yes.

Q. Were they in the neighborhood of two or three hundred?

A. No.

Q. A smaller number?

A. Yes.

Q. How many would you say?

A. It would be less than 50.

WILLIE BURKHEAD

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q. Will you state your name, address and occupation?

A. Willie Burkhead, Vaiden, Mississippi. I farm.

Q. How long have you lived in Carroll County, Mississippi, Mr. Burkhead?

A. All my life.

Q. Do you own property in Carroll County, Mississippi?

A. I do.

Q. And do you pay poll taxes in Carroll County?

A. I do.

Q. Do you attend public schools in Carroll County—I mean did you attend public schools?

A. I did.

Q. Are you registered to vote in Carroll County?

A. I am not.

Q. Have you ever applied, prior to November of 1954, to register as a voter in Carroll County, Mississippi?

A. Yes, sir, once.

. . . .

A. . . . . I don't remember whether it was more than once or not.

Q. Just for the record, Mr. Burkhead, you are a member of the Negro race, are you not?

A. I am.

Q. Now, Mr. Burkhead, are you at this time a registered voter in Carroll County?

A. I am not.

Q. Why aren't you a registered voter in Carroll County?

A. I never did register.

Q. Did you ever try to register?

A. I did. I asked the clerk if he had any objections, and he said personally he didn't, but there was some kind of a law that they had in Mississippi at that time that wasn't allowing anyone to register.

. . . .

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Did I understand you to say that you went to the clerk of Carroll County and sought to register?

A. Yes, sir, I asked him if he had any objections.

Q. Did he tell you that you couldn't register?

A. He said personally he didn't mind, that he had no objections, but at that time there was some kind of a law that was on in Mississippi that was not allowing anyone to register.

. . . .

Q. He didn't tell you that you couldn't register, did he?

A. No, sir.

Q. And he didn't tell you that you could not return to that office at some future date and register, did he?

A. No, sir.

Q. And you haven't returned and sought to register since that time, have you?

A. No, sir.

. . . .

REDIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

Q. Had you paid your poll tax prior to this occasion?

A. Well, I've been paying poll tax a good many years. First they started writing it on the regular tax receipt, then a few years after that, why they give you a receipt and then they stopped that. It was in '53 or '54, I think it was, and then they gave me a slip.

. . . .

ROY ROBERTSON,

a witness called by the Petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q. Please state your name, address and occupation.

A. Roy Robertson, and I am farming.

Q. Where do you live, sir?

A. Coila, Mississippi.

Q. How long have you lived in Coila, sir?

A. 57 years.

Q. That is in Carroll County, Mississippi, is it not?

A. Yes, sir.

Q. For the record, Mr. Robertson, you are a member of the Negro race?

A. Yes, sir.

Q. Did you go to school in Carroll County, Mississippi?

A. Yes, sir.

Q. Do you own property in Carroll County?

A. Yes, sir.

Q. Are you registered to vote in Carroll County?

A. No, sir.

Q. Why aren't you registered to vote in Carroll County, Mississippi?

A. Well, I haven't tried to.

. . . .

Q. Do you know of any members of the Negro race who registered to vote in Carroll County?

A. I do not.

. . . .

JOHN SMITH,

a witness called by the Petitioner.

BY MR. LEIGHTON:

Q. Please state your name, address and occupation, sir.

A. My name is John H. Smith. I live in Coila, Mississippi, and I am a farmer.

Q. How long have you lived in Carroll County?

A. All my life, 57 years.

Q. I take it then that you attended the public schools in Carroll County?

A. Yes, sir.

Q. Do you own any property in Carroll County?

A. Yes, sir.

Q. Are you registered to vote in Carroll County?

A. No, sir.

Q. To your knowledge, do you know of any member of the Negro race in Carroll County who owns property and pays taxes, including poll taxes, who is registered to vote, and who was registered to vote prior to November of 1954?

A. No, sir.

. . . .

ROBERT LEE GOLDSBY,

the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

. . . .

Q. And you are the petitioner in this case, are you not?

A. That's right.

Q. Where were you born, Robert?

A. In Canton, Mississippi.

Q. Calling to your attention to November of 1954, how old were you?

A. 28, I think it was.

. . . .

Q. And prior to November of 1954, had you ever been arrested for any crime other than the one with which you are now concerned?

A. No, sir.

Q. Where were you living in September of 1954, Robert?

A. In St. Louis.

. . . .

Q. Did you have any kin folk friends or acquaintances in Carroll County, Mississippi?

A. Not to my knowledge.

Q. Do you recall being arrested on or about Labor Day, 1954?

A. I do.

Q. Where was that?

A. Right out of Lexington, Mississippi.

Q. And up to that time, had you ever been the subject of any indictment for any felony?

A I never had.

Q. Did you have any kin folks in the State of Mississippi?

A. I did.

. . . .

Q. Do you recall being in Vaiden on November 8, 1954?

A. I don't know exactly what date it was.

Q. Well, to refresh your memory then, Robert, do you remember the day that you saw me in Vaiden, Mississippi?

A. I remember the day that I saw you, but I don't remember the date.

Q. What was that now?

A. I say that I remember the day of the week I saw you, but I don't know what the date was.

. . . .

Q. Do you recall what you did that day before the Court when I was there in Vaiden?

. . . .

A. The Judge asked did I plead guilty to the charge, and—or did I plead not guilty, and I did.

Q. Prior to that time, Robert, had you had a conference or conversation with me?

A. No, sir, I hadn't.

. . . .

Q. Where was it in that building that you did see me?

A. Well, it was the first that I can recollect, now let's see, the first time I seen you we was standing before the Judge putting in a plea of guilty or not guilty.

Q. Did you and I have any conversation on that occasion before or after?

A. No, sir, we didn't.

. . . .

Q. Did you, at any time near the moment when you appeared before the Judge, understand what I was doing there?

A. After seeing you?

Q. Yes.

A. Well, I had an understanding that probably you would be my attorney.

. . . .

Q. Did you, at that time, Robert, calling your attention to November 8, 1954, and before your trial, did you know anything about the provisions of our Federal Constitution and the rights you had under that Constitution?

A. I had no knowledge of any sort connected with the courts.

. . . .

Q. Did you, at any time between the date that you were in Vaiden, Mississippi, the date that you saw me, and the time that you were brought to trial, have a conversation or talk with anybody, either a member of your family or any other person, about the rights that you had as a prisoner in the state of Mississippi?

A. None whatsoever.

Q. Did you get to know an attorney named Mr. John W. Pruitt?

A. I did.

Q. When did you first see Mr. Pruitt?

A. The day of the paneling of the grand jury, I think I did. I think that was the first time, it was the day of the pounding of the grand jury, I believed they called it, instead of paneling.

. . . .

Q. Now Robert, when did you first learn, or get the idea that day you were in Vaiden, that Mr. Pruitt was there, and a grand jury, where did you get that idea?

A. Well, from the talk that was going on in the Courtroom.

Q. That is how you understood it?

A. Yes, sir.

Q. Now do you recall sitting there and going to trial before this jury?

A. I do.

Q. Now prior to the time you went to trial before this jury, had you seen Mr. Pruitt and talked to him?

A. I had not.

Q. Did you see any other attorney in court who was participating in your defense?

A. Yes, sir, there was another attorney there, but I can't think of his name.

Q. Did you talk with him prior to this trial?

A. Prior to the trial, I did not.

Q. Well, did you talk with him at any time during the trial?

A. Once or twice when we was in a little room together, one day with him, I talked with him about my case.

Q. Did either one of these two attorneys tell you at any time that you had the right to question who would be on that jury?

A. They did not.

Q. Did you at that time, Robert, know that you had a right to question the fact that there were no members of your race on that jury?

A. I didn't know that.

Q. Did anyone of those attorneys tell you that?

A. They did not.

Q. Robert, how far did you go to school in Mississippi?

A. To the fifth or sixth grade.

. . . .

Q. Now Robert, did anyone at any time tell you of the reason ~~why there~~ there had been a change of attorneys in your case prior to the time you went to trial?

A. I didn't know there had been a change until I come to trial.

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Robert, I believe you said that you were 28 years of age at the time you were tried in Carroll County?

A. Yes, sir.

. . . .

Q. I believe you say you went to the fifth or sixth grade in school in Mississippi?

A. Yes, sir.

. . . .

Q. Now you were in the service as a soldier, weren't you?

A. I was.

Q. What branch of the service were you in, Robert?

A. The Engineers.

. . . .

Q. What were your duties as a soldier while you were in service?

A. I was an auto mechanic.

. . . .

Q. And you had a high rating as that, didn't you?

A. Yes, sir, I did.

Q. What rank did you have as a soldier?

A. T-5.

Q. And how long were you in the service?

A. I was in the service six years, altogether.

. . . .

Q. And when were you then released from service?

A. In 1951.

. . . .

Q. And what were you doing in St. Louis?

A. When.

Q. Prior to your coming to Mississippi at the time this happened?

A. Well, at the time this happened, I was working at a shoe factory.

Q. What were you doing in that factory?

A. I was a lathe operator, I was a lather.

Q. Did you ever go to school under the G.I. bill?

A. I did.

. . . .

Q. How long did you go under that bill?

A. I finished high school.

. . . .

Q. And that was immediately prior to the happening of this instance in Carroll County, Mississippi?

A. Yes, sir.

. . . .

Q. Were you ever, at any time, denied the right to have members of your family or your attorneys come to see you?

A. Well, I know when I was in Jackson, I didn't have anyone come to see me, they didn't nobody come to see me until after my mother died, and I got out of Jackson and was taken to Louisville, but as to whether they objected to any of my folks coming to see me, I wouldn't know.

Q. Did you ask to see an attorney?

A. No, sir.

. . . .

Q. But where did you first come in contact with Attorney Leighton?

A. I come in contact with Attorney Leighton when I was standing before the Judge to make my plea of guilty or not guilty.

. . . .

Q. And didn't you have a conference with your attorney, Mr. Leighton, later on, and then you were in a room by yourselves, and that was before you came back in and the district attorney read the indictment to you and asked whether you pleaded guilty or not guilty, isn't that right?

A. No, sir, I didn't have any conversation with him at all.

Q. You never had any conversation with your attorney?

A. When I was there in the courtroom, that's all.

. . . .

Q. Do you mean to tell the Court that you cannot remember whether or not you ever had a conference or a conversation with Attorney Leighton there at the Courthouse at Vaiden, Mississippi?

A. I can tell the Court I remember seeing him, but to give an honest opinion, I would not say I did or did not, because I wouldn't know.

Q. Did Attorney Leighton tell you at the time that he [illegible] with you, did he ever tell you of your Constitutional rights in the proceeding in this trial?

A. No, sir, he did not.

. . . .

Q. And when you proceeded to trial, you were represented by Mr. John W. Pruitt of Vicksburg and Mr. Rupert Ringgold of Winona, Weren't you?

A. I was.

Q. And your own family employed Mr. Pruitt, didn't they?

A. I imagine they did.

. . . .

Q. Would you tell this Court that Mr. Pruitt and Mr. Ringgold didn't conduct a trial there in your behalf, and do for you everything that two first class lawyers could possibly do for their client in a courtroom, charged with the crime with which you were being tried?

A. I couldn't give you an account of that. I couldn't say yes or no, for I don't know.

. . . .

Q. During the course of that trial, did you make any request of your attorneys that they refused to comply with?

A. I made no requests whatsoever to my attorneys.

MR. LEIGHTON:

What was that answer? I didn't hear it.

THE WITNESS:

I said I made no requests whatsoever to my attorneys because I didn't know of any to make.

Q. During the time that you were in the Louisville jail, you were treated properly, were you not?

A. I was.

. . . .

THE COURT:

How many times did you talk with your lawyers when just you and your lawyers were in a room by yourselves, or with your witnesses who were there to testify for you, when they were present?

THE WITNESS:

I think twice, I imagine, I wouldn't be sure of that.

THE COURT:

No more than that?

THE WITNESS:

Well, it could have been a little more, but I wouldn't be sure. I said twice, I know I wouldn't be too far wrong.

REDIRECT EXAMINATION

BY MR. LEIGHTON:

Q. On these occasions, Robert, that you remember having talked with your counsel at the trial, were these on the day of the trial or before?

A. One of them was before the trial, that was the day they was getting a jury.

. . . .

DE WILLIE GOLDSBY,

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q. Please state your name, address and occupation?

A. De Willie Goldsby, 1208 Carter, Pascagoula, Mississippi. . . . I work in the shipyards there.

Q. You are a brother of Robert Lee Goldsby, the petitioner here, are you not?

A. Yes, sir.

. . . .

Q. What was the occasion of your being in Vicksburg, Mississippi?

A. I went over there, me and my auntie, to see about getting some money from the bank there on our home, and she told them that we had to get a lawyer, so the man at the bank, he made up the deed on the place, and so she started and decided that she would go see her lawyer, that was Lawyer Pruitt.

. . . .

Q. Mr. Goldsby, in this conversation with Mr. Pruitt, was there any reference to the status of the lawyer representing your brother?

A. Yes, sir. I told him about who I had, and I asked him would it be all right, and that's the lawyer that they want, and I said "Could you work with him".

Q. What was said about that?

A. He told me no, he could not work with him at all.

. . . .

Q. Was there any mention to Mr. Pruitt about the race of the lawyer that was in the case at that time?

A. Yes, sir, it was.

Q. How did that question arise as to the race of that lawyer; how did that come into the conference?

A. He said it wouldn't look right, and then he asked me how would I feel having a Negro lawyer from Chicago on a case like that down in Vaiden, Mississippi.

MR. PATTERSON:

We object to that for the same reason, if the Court please.

THE COURT:

That objection is sustained as to the last answer of the witness. The witness' answer to that question will not be considered by the Court in passing on the matter.

. . . .

CROSS EXAMINATION

BY MR. PATTERSON:

. . . .

Q. Mr. Pruitt was your aunt's regular attorney?

A. Yes, sir.

. . . .

Q. I said Mr. John Pruitt, that attorney of Vicksburg, was employed to go to Vaiden ~~and~~ represent your brother?

A. Yes, sir, he was.

MRS. ALICE ADMON,

a witness called by the petitioner:

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q. Would you please give us your name and address?

A. Alice Admon, Vicksburg, Mississippi.

. . . .

Q. I believe you are the aunt of Robert Lee Goldsby?

A. Yes, sir.

. . . .

Q. Mr. Pruitt was your attorney at that time?

A. Yes, sir.

. . . .

CROSS EXAMINATION

BY MR. PATTERSON:

Q. Your home is in Vicksburg, I believe?

A. Yes, sir.

. . . .

Q. And you knew for a fact that Mr. Pruitt is recognized and considered one of the best attorneys in Vicksburg, you knew that, didn't you, you live in Vicksburg, and you knew that he was an outstanding lawyer handling criminal cases in Vicksburg, didn't you?

A. Yes, sir.

. . . .

Q. Well, without going into the details of this conversation, you did employ him to go to Vaiden and defend your nephew, did you not?

A. Yes, sir.

Q. And you paid him a fee to do that?

A. Yes, sir.

. . . .

MR. LEIGHTON:

May I ask the Court Reporter just prior to the closing of the petitioner's proof, to mark as Exhibit 1 and 1-A, the exhibit which is Page 2 of the proceedings before the United States Senate on June 10, 1957.

. . . .

THE COURT:

Well, you can get it in the record here to make up your record in this case, and you may offer it, but the exhibit is rejected. The record will show that it was offered and is marked as a rejected exhibit.

. . . .

MR. LEIGHTON:

Now Your Honor, the second exhibit is Page 29 through 40 of the Census of the United States, of the State of Mississippi. . .

. . . .

THE COURT:

That objection is overruled, the Court being of the opinion that, of course, the Court probably will take judicial notice that it will be received in evidence for what it is worth.

. . . .

MR. LEIGHTON:

We ask the Court for authority for the petitioner to serve notice of the taking of depositions of certain witnesses in Chicago, and that these depositions be taken in the District Court for the Northern District of Illinois in Room 263 of the Courthouse of the District Court for the Northern District of Illinois by Mr. Alfred H. Fredericks, Official Court Reporter for the Northern District of Illinois—. . . .

. . . .

THE COURT:

You may file your motion and get it in the record. I will reserve ruling on it now, and if this closes your case, we will proceed with the Respondent's proof.

HENRY L. ROGERS,

a witness called by the Respondent:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q. State your name and place of residence, please.

A. Henry Rogers. I am a resident of Louisville, Mississippi.

Q. What official position do you hold in Mississippi at this time, Judge?.

A. I am Circuit Judge for the Fifth Circuit District.

Q. How long have you been Circuit Judge of your district?

A. Well, this is the 8th year.

. . . .

Q. Judge Rogers, were you the presiding judge in the case of the State of Mississippi against Robert Lee Goldsby?

A. I was, sir.

. . . .

Q. Do you recall Attorney George Leighton appearing in your court as representing this defendant?

A. Yes, sir.

. . . .

Q. Judge, at the time you suggested that he confer with his client, and you offered to clear out a room for him, did he ask if he was permitted to confer with his client down here?

A. Yes, and I told him he certainly was, and to take his client to the room that I had prepared for him, which he did, and they were in that room some 25 minites before the defendant was arraigned.

Q. Did Attorney Leighton indicate what his motion was, or what the motions, I believe you said that he mentioned filing some motions, did he ever indicate what those motions were going to be?

A. Well, my answer is simply an impression that I got from him. I got the impression what his motion would be, and I recall telling him that I had a brief on what I thought his motion was at the time.

. . . .

Q. And so you gave him until Wednesday to prepare and present those motions?

A. Yes, sir.

Q. Did I understand you to say that you had a brief there on what you anticipated the motion to be, and that you stated to him that if he submitted that motion and had proof to support the motion, that you would certainly sustain it?

A. That is what I told him.

. . . .

Q. You did not appoint the other counsel who appeared later in the case in behalf of the defendant?

A. Mr. Ringgold had a conference with the defendant while he was there, and after he had taken him into a room alone, I suppose that he talked with the defendant and his relatives who were present, and on Wednesday morning, when the case was called, Mr. Pruitt showed up, and that was my first knowledge of Mr. Pruitt's connection with the case when he appeared and announced that the Goldsby people, maybe the defendant's mother, I don't know who, had employed him to assist in the trial, and I asked Mr. Ringgold if Mr. Pruitt could not be joined in the appointment that I had made of him, and he said that would be all right, so I put both names in the record as representing the defendant.

. . . .

Q. I would like for you to state whether, in the trial of this particular case, and observing the trial as you naturally did, was there anything in the conduct of the trial about the method of the defense of this petitioner here, that would have led you, or anyone else, to believe that he was not being ably represented by his counsel?

A. No, sir; he certainly was ably represented, and I think the record will show that Mr. Pruitt and Mr. Ringgold made a wonderful showing.

. . . .

Q. There was no occasion, or there was no indication at any time that they were just putting up a token defense of this defendant?

A. No, sir, they put up a very good defense, if I may say so.

. . . .

Q. Now in the matter of the drawing of the jury in your court, state whether or not at any time you, as judge, have ever directed that in the selection of jurors for Carroll County, or any other county in your district, but particularly Carroll County, has there been any difference made in the selection of the white or colored jurors, or any kind of exclusion of colored jurors?

A: No, sir.

. . . .

CROSS EXAMINATION

BY MR. LEIGHTON:

Q. So since 1951 you have been the judge in that Fifth District?

A. Yes, sir.

Q. During the time you have been a District Judge and presiding over jury trials, have you ever seen on a jury of twelve men a person known to be a Negro?

A. Well, that is relative. It is not known to me. I wouldn't know. A man is largely what he says he is, and we have a number of Choctaws in this part of the country, and we have some Cherokees, both tribes of Indians have a good many people living in this area.

Q. But as far as you know, Judge Rogers, just from what you could tell by looking at prospective jurors, have you ever known a juror of the twelve men to be a Negro?

A. Well, I've never seen that I can recall a man of the look of the defendant, a man with a long jaw, kinky hair, and black complexion, but I have seen men darker than you are.

Q. Now those men that you say you have seen who are darker than I am, were they members of the Negro race?

A. I just don't know about that; I don't know, because a man is largely what he says he is and what people say he is, and I know people say they are white, and I have heard they were Negroes, and vice versa.

Now as to knowing about that, I don't.

Q. Well, with regard to the motion filed, were any of those motions a motion to quash the indictment because of the exclusion of Negroes from the jury?

A. No, sir; had such a motion been made and proved, that would have been sustained.

. . . .

JOHN E. ALDRIDGE,

a witness called by the Respondent:

DIRECT EXAMINATION

BY MR. PATTERSON:

. . . .

Q. What official position do you hold in the State of Mississippi?

A. I am District Attorney for the Fifth Judicial District.

Q. How long have you been District Attorney?

A. Since November of 1950.

Q. And this is the same Mr. Aldridge who testified before?

THE COURT:

Go ahead with your questioning. We understand this is the same witness.

. . . .

Q. Do you recall whether or not Mr. Leighton was afforded an opportunity to confer with his client?

A. Yes, he was afforded every opportunity. The Court cleared out a room and gave him that room for conferences with his client.

. . . .

Q. Mr. Aldridge, in the course of that trial, would you say as an attorney, with vast experience in the trial of criminal cases, state whether or not Mr. Pruitt and Mr. Ringgold offered an able defense of this defendant throughout the trial?

A. I have known of Mr. Pruitt up to that time; however, I had never been in a trial with him, but I found he was one of the most able adversaries and counsellors that I had been in court with, and he undoubtedly was a very able lawyer, and he and Mr. Ringgold fought hard throughout this trial.

. . . .

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

Extract from the Minutes of January 16, 1959.

UNITED STATES OF AMERICA, ex rel,
ROBERT LEE GOLDSBY,

No. 17300 versus

WILLIAM HARPOLE, Superintendent of the Mississippi State Penitentiary, Parchman, Mississippi.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and judgment here rendered in accordance with the holdings of the opinion of this Court;

It is further ordered and adjudged that the appellee, William Harpole, Superintendent of the Mississippi State Penitentiary, Parchman, Mississippi, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

ORAL OPINION OF HONORABLE CLAUDE F. CLAYTON, UNITED STATES DISTRICT JUDGE, DENYING GOLDSBY'S PETITION FOR WRIT OF HABEAS CORPUS (R. 223-225).

Mr. Court Reporter, take this:

The issues of fact, as I understand them in this proceeding, are very much as I stated at the beginning of this hearing. For the benefit of counsel in any further proceeding that may arise, I will state my findings of fact and conclusions of law separately.

First: The proof shows, as I indicated to counsel for petitioner before he made his argument, that the grand jury which returned the indictment against this petitioner had no Negroes on it.

Second: The proof shows that the petit jury which tried the petitioner had no Negroes on it.

Third: The proof fails to meet the burden, as I understand it, of showing a "systematic and willful" exclusion of any member of the Negro race from jury service in that county.

Fourth: As a matter of fact, it is rather difficult for the Court to distinguish between fact and law in the twilight zone that arises between the two, but as a matter of fact the Court finds that the peitioner has, and had, at the time of his indictment and trial a high school education, and finds as a fact that he was twenty-eight years old at the time; and finds as a fact that he was represented at the preliminary aspect of the matter by counsel, who were chosen for him by some means not shown by testimony in this record—they being the firm of Tighe & Tighe of Jackson, Mississippi; next, that he was represented by counsel, as the record shows, of his family's selection, Mr. Leighton, at his arraignment; that he was represented by able and competent counsel of his family's selection and employment throughout the trial and in the Supreme Court of Mississippi on appeal, and that in addition he was represented by able counsel appointed by the Circuit Court of Carroll County.

With these factual findings, the Court could not do otherwise than conclude, as a matter of law, that ample opportunity was afforded this petitioner to raise in the courts of the State of Mississippi, the constitutional question involved in this hearing, and undoubtedly if the question of the absence of Negroes from the grand jury and the absence of Negroes from the petit jury had been presented in the Circuit Court of Carroll County by a proper motion to quash, such a motion would have been sustained. That is borne out by the case I cited to counsel, Farrow v. State, 91 Mississippi 509, 45 Southern 619, decided in 1908.

The opportunity was there, the decision was made by competent counsel of the family's employment and of the Court's appointment not to raise that question and not to invoke that issue in the lawsuit.

Under these circumstances, the Court is of the opinion that the petitioner understandingly, in connection with his counsel, waived whatever right he may have had to present any question with respect to the composition of the jury, and that he, therefore, is barred from raising the question here or prevailing on that question being raised in this Court.

Appendix C

The Court is further of the opinion that the motion for taking of depositions in Chicago is not only untimely, having been filed too late, but from statement of counsel as to the purpose of taking the testimony of those witnesses, in the light of the Court's findings that I have given you, the testimony would not be of any help here.

APPENDIX D

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties f[illegible] services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

TITLE 28, UNITED STATES CODE, SECTION 2241.

Section 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under

color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964. amended May 24, 1949, c. 139, § 112, 63 Stat. 105.

APPENDIX F

SECTION 26, MISSISSIPPI CONSTITUTION OF 1890:

Section 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultry, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

SECTION 241, MISSISSIPPI CONSTITUTION OF 1890:

Section 241. Every inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States of America, twenty-one years old and upwards, who has resided in this state for two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, and who has paid on or before the first day of February of the year in which he shall offer to vote, all poll taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid such taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church, or his wife legally residing with him, shall be entitled to vote after six months' residence in the election district, incorporated city or town, if otherwise qualified.

SECTION 242, MISSISSIPPI CONSTITUTION OF 1890:

Section 242. The legislature shall provide by law for the registration of all persons entitled to vote at any election, and all persons offering to register shall take the following oath or affirmation: "I, ..., do solemnly swear (or affirm), that I am twenty-one years old (or I will be before the next election in this county), and that I will have resided in this state two years and .... election district of .... county one year next preceding the ensuing election (or if it be stated in the oath that the person proposing to register is a minister of the gospel in charge of an organized church, then it will be sufficient to aver therein two years' residence in the state and six months in said election district), and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this state as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this district; that I will faithfully support the Constitution of the United States and of the state of Mississippi, and will bear true faith and allegiance to the same. So help me God." In registering voters in cities and towns not wholly in one election district, the name of such city or town may be substituted in the oath for the election district. Any wilful and corrupt false statement in said affidavit, or in answer to any material question propounded as herein authorized, shall be perjury.

SECTION 243, MISSISSIPPI CONSTITUTION OF 1890:

Section 243. A uniform poll tax of two dollars, to be used in aid of common schools, and for no other purpose, is hereby imposed on every inhabitant of this state, male or female, between the ages of twenty-one and sixty years, except persons who are deaf and dumb, or blind, or who are maimed by loss of hand or foot; said tax to be a lien only upon taxable property. The board of supervisors of any county may, for the purpose of aiding the common schools in that county, increase the poll tax in said county but in no case shall the entire poll tax exceed in any one year three dollars on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax.

SECTION 244, MISSISSIPPI CONSTITUTION OF 1890 (in effect during the year 1954— prior to amendment prescribing additional qualifications in 1955):

Section 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892.

SECTION 264, MISSISSIPPI CONSTITUTION OF 1890:

Section 264. No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court.

SECTION 1762, MISSISSIPPI CODE OF 1942, RECOMPILED:

Section 1762. Who are competent jurors.

Every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall be qualified who has served as such tales juror or talesman in the last preceding two years; and.

no juror shall serve on any jury who has served as such for the last preceding two years; and no juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.